QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:

From October 1, 1940

Through December 31, 1940

Volume XXI

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from October 1, 1940 through December 31, 1940.

The Act referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

THOMAS S. LAWSON,

Attorney General.

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OPINIONS

October 3, 1940.

Hon. Jas. F. Hester,
Tax Collector,
Franklin County,
Russellville, Alabama.

Tax Collectors — Commission — General Acts, 1939, p. 466.

In determining commissions allowed Tax Collectors, the amount collected as State Tax is not controlling on commissions of County General Fund Tax.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 16, 1940, in which you request my official opinion as follows:

"I am writing you for the purpose of obtaining your official opinion on the question of the method of figuring the compensation of the Tax Collector of Franklin County, which will necessarily fix the amount of such compensation, and involves the construction or interpretation of an act of the Legislature of 1939, M-B-321, approved August 31, 1939, entitled 'An Act to amend Section 161 of an act entitled "An Act to provide for the general revenue of the State of Alabama," approved July 10, 1935.'

"The general fund State tax for Franklin County amounts to $11,-721.83, and the general fund County tax amounts to $32,012.70.

"In figuring my compensation for collecting the State tax, I, therefore took the rate specified in said act for Counties where collections do not exceed $12,000.00, and deducted ten per cent on the first $5,000.00, five per cent on the next $4,000.00 and four per cent of the remainder.

"The Act, after specifying the rate of commission for collecting the State Tax, provides, **'The Commission herein provided for is to be calculated on all collections for the General Fund of the State and County.'** Therefore, in figuring my compensation for collecting the $32,102.70 County Tax, I deducted ten per cent of the first $5,000.00, five per cent of the next $4,000.00, and four per cent of the remainder.

"The State examiner, in checking my records, contended that on this $32,012.70 I am entitled to 10% of the first $5,000.00, 5% of the next $4,-000.00, 4% on the next $3,000.00, it being the balance up to $12,000.00 and only 1½% from that figure up to $15,000.00, and 1% on the remainder above $15,000.00. It is my contention that this last rate of compensation, used by the examiner applies only to Counties where the State Tax **exceeds** $12,000.00, and that this act so provides.

"I, therefore, ask your opinion on this question:

"In Franklin County, where the State Tax collections are less than $12,000.00, and the County tax collections amount to $32,012.70, is the Tax Collector, under said act, entitled, for the collecting of said **County Tax,** 10% on the first $5,000.00, 5% on the next $4,000.00, and 4% on the remainder?"

I am of the opinion that the State Examiner is correct in his statement to you of the amount of commissions allowed you under the law.

I call your attention to Section 1 of Act No. 325, H. 321, approved August 31, 1939, General Acts, 1939, p. 466, which provides:

"Section 1. That Section 161 of an Act entitled 'An Act to provide for the general revenue of the State of Alabama,' approved July 10, 1935, be and the same is hereby amended to read as follows: Section 161. TAX COLLECTORS COMMISSIONS. — The tax collector shall, during the current term of the present incumbent of said office be paid commissions, as now provided by law; after the expiration of the present term of the present incumbent of the office of tax collector and beginning on the first day of October, 1939, the tax collector shall be entitled to receive commissions on taxes collected by him, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, as follows: In counties where collections, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, do not exceed twelve thousand dollars, the rate of commission shall be ten per cent on the first five thousand dollars, five per cent on the next four thousand dollars, and four per cent on the remainder. The Commission herein provided for is to be calculated on all collections for the general fund of the State and County. In counties where the collections, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, exceed twelve thousand dollars, the commissions shall be as above declared up to twelve thousand dollars, and one and one-half per cent on the remainder up to fifteen thousand dollars, and one per cent on the remainder above fifteen thousand dollars. The amount of the commissions on taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes shall inure to the benefit of the general fund of the State only, and shall be covered into the State Treasury to the credit of said fund. He shall also be entitled to receive two per cent on all collections made by him of special taxes, whether such special taxes be levied for the State or County, to be paid out of such special taxes. The tax collector shall receive two per cent commissions on all Special County or district taxes levied for school purposes. The collector may retain his commissions upon collections when he makes payment into the State Treasury."

Prior to the enactment of the above statute the 1935 law provided that where the collections were under twelve thousand dollars, the Tax Collector was entitled to eight per cent on the first one thousand dollars, four per cent on the second thousand dollars, and two per cent on the remainder up to twelve thousand, and where the collections were over twelve thousand dol-

lars he was entitled to the same percentage up to twelve thousand dollars, and on the remainder one and one-half per cent up to sixty thousand dollars, and on all over sixty thousand dollars, he was entitled to one per cent on the collections.

Under Act No. 325, supra, these commissions were changed and the Tax Collector is now entitled to the following commissions: Where the collections are under twelve thousand dollars, the Tax Collector is entitled to ten per cent on the first five thousand dollars; five per cent on the next four thousand dollars; and four per cent on the remainder up to twelve thousand dollars; and on collections over twelve thousand dollars and up to fifteen thousand dollars, the Collector is entitled to the same commissions allowed up to twelve thousand dollars; and on the remainder up to fifteen thousand dollars, he is allowed one and one-half per cent commission; and on all over fifteen thousand dollars, he is entitled to one per cent commission.

It is my opinion that when the Legislature inserted the following sentence in Act No. 325, supra, "The commission herein provided for is to be calculated on all collections for the general fund of the state and county," it was intended to clarify any doubt that had heretofore existed as to whether or not the Tax Collector was entitled to commissions on the total collections instead of separate commissions for the State and county.

The premises considered, it is my opinion that the amount collected by you as State Tax does not control the commissions allowed you for the collections of County General Fund Tax, but that the State and County taxes are separate and that you should figure your commissions separately on the State and County Taxes.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 4, 1940.

Hon. Dayton Robinson,
County Superintendent of Education,
Clarke County,
Grove Hill, Alabama.

Schools — County Board of Education—Consolidation of Schools—

1. County Board of Education may not legally expend school funds to rebuild school in a county which is not designated as a school center by the State School Survey.

2. County Board of Education may consolidate two schools located in same school district without the consent of the trustees of each school.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of September 17, 1940 follows:

"I wish to request your official opinion on the two following points:

"1. Until last year, the County Board maintained a small school in the community known as Opine; the school building burned last Fall. The State Superintendent of Education advised the County Board in writing that the Opine School building should not be re-built, for the reason that Opine is not designated as a school center under the new school survey.

"In view of this notification from the State Department, I wish to inquire whether the County Board can legitimately expend funds for reguilding the Opine school building.

"2. Section 100 of the 1927 School Code relates to the consolidation of schools, and provides that no schools shall be consolidated, by consolidating two or more schools located in different school districts, without the consent of the school trustees of each district. We have no district school trustees; under section 133 of the 1927 school Code, as amended by Act of 1931, page 672, trustees are elected for every school. For purposes of levying and collecting a district three mill school tax, Clarke County is divided into two districts, known as District A and District B, respectively.

"Can the County Board of Education consolidate two schools, both located in District A, without first obtaining the consent of the school trustees of each school?"

My answer to your first inquiry is in the negative. Your attention is called to Section 137 of the School Code of Alabama, 1927, which reads as follows:

"137. **District Tax May Be Used For Building and Equipment**—The respective county boards of education and city boards of education in the respective counties and cities of the State of Alabama may appropriate and use any district three mill tax that has been or may hereafter be voted in any school district to pay and discharge any obligations or debts which may have been or hereafter are created to build, furnish or equip a public school building for said school district, or to refund money out of the said three mill district tax to any person or corporation who has or may hereafter advance money for such purpose."

It will be noted from the above quoted Section that the County Board of Education is authorized to expend the three mill district school tax for the purpose of building, furnishing or equipping public schools in said district. In this regard your attention is called to Section 71 of the School Code of Alabama, 1927, which reads as follows:

"71. **County and City Boards of Education's Action Reviewed.**—The State Superintendent of Education under rules and regulations promul-

gated by the State Board of Education, shall have the authority to review actions and orders of county and city boards of education and of county superintendents of education and city superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest. Upon such review the State Superintendent of Education shall have the power to determine from the facts the just and proper disposition of the matter. The order of the State Superintendent shall be binding."

It will be noted that the State Superintendent of Education has authority to review the actions and orders of County Boards of Education in matters relating to the financial interest of said schools. In my opinion the building of a school house in a county is very vitally related to the financial interest of the schools of the county. It will be further noted that the orders of the State Superintendent of Education in this regard shall be binding.

You are, therefore, advised that in my opinion if the State Superintendent of Education does not approve and authorize the building of a school house in a community in any given county, the County Board of Education may not legally expend its funds for this purpose.

Aside from the above, I call your attention to Sub Section e(1) of Section 2 of Act No. 295, H. 852, approved September 2, 1935, (General Acts 1935. page 714), which is commonly referred to as the Minimum Program Fund Act. This SubSection reads as follows:

"Section 2. PURPOSES AND PLAN OF APPORTIONMENT. In addition to all other appropriations and apportionments of public school money now provided by law and made available for elementary and high schools there shall be apportioned and paid to county boards of education from the Minimum Program Fund the amounts to be determined as hereinafter provided and in accordance with regulations of the State Board of Education. This Minimum Program Fund shall be used principally (1) to aid in providing at least a seven months' minimum term for all schools, and (2) to assist in the promotion of equalization of Educational opportunity for all children in the public elementary and high schools. The following requirements and procedures, supplemented when necessary by regulations of the State Board of Education, shall govern the apportionment of the fund: 1. REQUIREMENTS FOR PARTICIPATING IN THE FUND.—In order for the public schools of a county, including the independent cities, to share in the apportionment of a Minimum Program Fund, and to receive the maximum benefits therefrom, they shall meet the following conditions:

* * * *

e. As soon as practicable after July 1, 1935, the county board of education shall submit to the State Superintendent of Education for his approval under the regulations of the State Board of Education, the following: 1. A proposed county-wide building program which sets out in detail the location of all present and proposed buildings; which indicates proposed educational centers and grades to be taught at these centers, and which provides schools for all the children of the county."

It is my opinion that if the County Board of Education should build a school house without the approval of the State Superintendent of Education, they would seriously endanger their right to participate in the Minimum Program Fund provided by Act No. 295, supra.

My answer to your second question is in the affirmative. Section 100 of the School Code of Alabama, 1927, reads as follows:

> "100. **Consolidation of Schools.** — The County Board of Education shall consolidate schools wherever in its judgment it is practicable, and arrange, if necessary for the transportation of pupils to and from such consolidated schools. But no schools shall be consolidated by consolidating two or more schools located in different school districts, without the consent of the school trustees of each district."

It will be noted from the above quoted Section that the consent of the trustees for the consolidation of two schools is only necessary when the schools are located in different school districts. From the facts stated in your letter, the two schools which the County Board of Education desires to consolidate are both located in District A, of Clarke County.

You are, therefore, advised that in my opinion these two schools may be consolidated without first obtaining the consent of the trustees of these two schools.

I note from the above request that the school trustees of each school in your County are elected under the provisions of Act No. 590, H. 191, approved August 1, 1931 (General Acts 1931, page 672). For your information, this Act has been repealed by Act No. 507, S. 424, approved August 13, 1935 (General Acts 1935, page 1090). It will be noted in Section 3 of Act No. 507, supra, that the County Board of Education shall appoint the school trustees for each school rather than the trustees being elected as provided by Act No. 590, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 5, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Absentee Ballots — Elections — Probate Judge—

Probate Judge, when he is a candidate in the General Election, disqualified under the statute from handling absentee ballots for the General Election.

Probate Judge not disqualified from handling absentee ballots in Special Election in which he not a candidate.

Sheriff is not authorized to handle absentee ballots in a Special Election in which the Probate Judge is not a candidate.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 2, 1940, in which you request my official opinion as follows:

"My understanding is that since I am a Candidate to succeed myself as Probate Judge in the General Election to be held on November 5th, that I am disqualified under the Statute to handle the absentee ballots for said General Election.

"On the same date, namely November 5th, a Special Election will be held submitting to the qualified voters of Alabama a number of Constitutional Amendments. Am I also disqualified from handling the absentee ballots for that Special Election?

"It would be very desirable to have one officer handle both sets of absentee ballots if it could be legally done. Specifically I want to know if it would be lawful for the Sheriff to handle the absentee ballots for both the General Election, in which I am disqualified to serve, and the Special Election to be held on that date."

Your first inquiry is answered in the affirmative. I call your attention to Section 2, Act No. 178, S. 27, approved April 19, 1933, (General Acts, 1933, page 193), which provides:

"Section 2. In any general, special, or primary election, when the Judge of Probate is a candidate for any office, he shall be disqualified from performing any of the duties in reference to the handling of absentee ballots which are now or may hereafter be required to be performed by him, and all such duties shall be performed by the Sheriff of said County. In the event the said Sheriff is also a candidate in such election, the Judge of Probate shall, at least forty-five days prior to the date of the election, certify said facts to the presiding Judge of the Circuit in which such county is located, and within five days thereafter such Circuit Judge shall appoint a qualified elector of said county, who is not a candidate for any office, to perform such duties. The Sheriff, or, in the event he is disqualified as here provided, the person so appointed by the Circuit Judge, is hereby authorized to perform all of the duties, with reference to the handling of absentee ballots, as are now or may hereafter be required to be performed by the Judge of Probate."

The above quoted section is clear and unambiguous to the extent that it disqualifies the probate judge from handling absentee ballots for the General Election in which he is a candidate. Biennial Report of Attorney General, 1932-34, page 540.

Your second inquiry is answered in the negative.

You are not disqualified from handling the absentee ballots in the Special Election, because you are not a candidate, nor does your name appear on the ballot to be voted upon in said Special Election.

In answer to your third inquiry, I am of the opinion that the Judge of Probate is the only person authorized under the law to handle the ballots in the Special Election, and the Sheriff is the only person authorized under the law to handle the absentee ballots for the General Election, since the Probate Judge is a candidate and his name will appear on the ballot in the General Election.

The mere fact that the General and Special Elections are to be held on the same day is of no consequence and does not change the law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 7, 1940.

Hon. Chris J. Sherlock,
Director, Highway Department,
Capitol.

Taxation — Interception of funds held by State due to delinquent tax payer's Surety — Rights of surety on defaulted highway contractor's bond—

Balance in the hands of State Highway Department due on construction contract in execution of which principal has defaulted, cannot be applied to ad valorem tax liability of defaulting contractor in priority to claim of surety on defaulting contractor's bond for reimbursement of amount expended by reason of suretyship.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated February 14, as follows:

"Re: Opinion addressed to the Hon. Chris J. Sherlock, State Highway Director, under date of September 7, 1939, by Assistant Attorney General Kohn.

"I am herewith enclosing copy of letter received by this Department relative to the withholding of certain sums in the amount of $272.80, for payment of ad valorem taxes.

"This matter was fully set forth in your opinion, and this office is calling your attention to the said enclosed letter, asking that you advise us if there should be any change from the decision contained in your opinion described above."

The opinion of this office under date of September 7, 1939 to Hon. Chris J. Sherlock, did not cover the questions of a set-off against a surety or priority of the State's claim for taxes, as against a surety, it was limited to the question of a set-off against the principal, the contractor.

I understand the facts to be: A surety company was the surety on the bonds of the Truck Company, the contractor, under Project F.A.S. 18 A (1) Chilton Co. The contractor defaulted in that it failed to pay approximately $3,000 to laborers and materialmen. The surety company has paid or will pay these claims by virtue of its liability under said bond for the payment of labor, materials, feed-stuffs or supplies, which provided in part as folllows:

"PROVIDED, further, in the event that the said ....., as such Contractor shall fail to make prompt payment to all persons supplying him or them with labor, materials, feedstuffs, or supplies for or in the prosecution of the work provided for in such contract, the above bound ..... as Sureties shall be liable for the payment of such labor, materials, feed-stuffs or supplies and for the payment of reasonable attorney's fees incurred by successful claimants or plaintiffs in suits on said bond as provided in Act No. 39, H. B. 125, approved February 8, 1935.

"PROVIDED, further, that said Contractor and Sureties hereby agree and bind themselves to the mode of service described in Act No. 39, H. B. 125, approved February 8, 1935, and consent that such service shall be the same as personal service on said Contractor or Surety.

"Upon the completion of said Contract pursuant to its terms, if any funds remain due on said Contract, the same shall be paid to said Principal or Sureties.

"The decision of said State Highway Director upon any question connected with the execution of said Contract, or any failure or delay in the prosecution of the Work by said Principal or Sureties, shall be final and conclusive.

"A copy of the Proposal, Specifications and the Contract hereinabove referred to, and the Bond For Performance Of The Work executed under the provisions of Act No. 39, H. B. 125, approved February 8, 1935, is attached and made a part of this obligation and this instrument is to be construed in connection therewith." (Emphasis supplied.)

The performance bond provides in part as follows:

"PROVIDED, further that upon the failure of the said ..... to promptly and efficiently prosecute said work, in any respect, in accordance with the contract, the above bound ..... **as sureties,**

shall take charge of said work and complete the contract at their own expense, pursuant to its terms, receiving, however, any balance of the funds in the hands of said State due under said contract. Said sureties may, if they so elect, by written direction given to the State Highway Director authorize the State Highway Director to advertise for bids to complete the said contract at the expense of said sureties, and such sureties hereby agree and bind themselves to pay the expense of the completion of such work, less any funds in the hands of the State remaining due to above bound Contractor." (Emphasis supplied.)

Before the work was begun, the contractor gave the surety an indemnity agreement, which provided in part as folllows:

"Third, to assign and convey and does hereby assign and convey to the Company as collateral to secure the obligations herein and any other indebtedness or liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, all the right, title and interest of the undersigned in and to: (a) said contract and any change, addition, substitution or new contract (including all retained percentages, deferred payments, earned moneys and all moneys and properties that may be due or become due under said contract, change, addition, substitution or new contract), and every sub-contract let or that may be let in connection therewith and every bond securing the same, and every claim which the undersigned may have or acquire against any person furnishing or agreeing to furnish labor, material, supplies, machinery, tools or equipment in connection with said contract or any sub-contract;"

The Probate Judge of Dallas County advised the Highway Department that there is now due from the contractor the sum of $272.80 to the State of Alabama, County of Dallas and City of Selma, for ad valorem taxes, and requested the Highway Department to withhold payment to the Surety, who had completed the job for its principal, the contractor, of enough money to cover these delinquent ad valorem taxes.

You want to be advised if you have authority to withhold such funds; i.e., can the State claim as a set-off against the surety company the amount owed the State, County and City for advalorem taxes by the principal, or if the State's claim for such taxes is superior to the claim of the Surety,

In my opinion, your questions should be answered in the negative. The solution of the questions depends upon the proper interpretation of portions of the Surety Contract, quoted supra, and of Act. 39, H. 125, General Acts 1935, page 70, which, as is here pertinent, provides:

"Section 1. Any person, firm or corporation entering into a contract with the State or any County or municipal corporation or sub-division thereof in this State for the repair, construction or prosecution of any public buildings or public work, highways or bridges, shall be required, before commencing such work, to execute * * * bond with good and sufficient surety, payable to the State, County or municipal corporation or subdivision, letting the contract, in an amount not less than 50% of the contract price, with the obligation that such contractor or contractors

shall promptly make payments to all persons supplying him or them with labor, materials, feed-stuffs or supplies for or in the prosecution of the work provided for in such contract, and for the payment of reasonable attorneys fees, incurred by successful claimants or plaintiffs in suits on said bond; and any person, firm or corporation that has furnished labor, materials, feed-stuffs or supplies for or in the prosecution or repair of any public building or public work, highways or bridges, and payment for which has not been made, shall be authorized to institute an action upon said bond in his or their name or names and to have their rights and claims adjudicated in such action and judgment rendered thereon; provided, however, that no suit shall be instituted on said bond until after forty-five days written notice to the surety thereon of the amount claimed to be due and of the nature of the claim. * * * * Every person or persons having a right of action on said last described bond as herein provided shall, upon written application to the authority under the direction of whom such work has been prosecuted, setting out that labor, material, feed-stuffs or supplies for such work has been supplied by him or them and that payment therefor has not been made, be promptly furnished a certified copy of said additional bond and contract. Such claimant shall be authorized to bring suit on said bond in the county in which the work provided for in said contract is to be performed, or in any county where the contractor or his surety does business, for his or their use and benefit against said contractor and his surety or either of them."

It will be noted that the provisions of the bond obligate the surety only in connection with the payment to all persons supplying the contractor with labor, materials, feed-stuffs or supplies for, or in the prosecution of, the work provided for in such contract. The surety on the bond, in no event, is obligated by the execution thereof, to pay any tax obligation due by the principal to the State or to any of its sub-divisions.

In **New York Indemnity Company v. Niven 222 Ala. 562, 133 So. 261,** the Supreme Court construed a similar provision, contained in the Alabama Highway Code of 1927 (Michie's Alabama Code of 1928, Section 1397 (30)).

Speaking to the question as to the priority of the State's claim over the claims of other creditors covered by such bonds, the court said:

"Thus the priority of claims of the United States is expressly preserved in the foregoing statute (or act of Congress of 1905 (Mankin v. U.S. to Use of Ludowici-Celadon Co., 215 U.S. 533-540, 30 S. Ct. 174, 54 L. Ed. 315) amending the act of 1894), and there is no **express provisions** for priority of the state's claim contained in the Alabama statute, section 1397, Code. Is such priority of the state's claim over that of individuals necessarily implied under the statutes and suretyships thereunder liberally construed to the end in view and results to be protected against or evils prevented Young v. American Bonding Co., 228 Pa. 378, 77 A. 623; United States v. Lynch (D. C.), 192 F. 364, 369. We have indicated that under the old statute of the United States, before the amendment of 1905, it was held that there was no priority of the United States' claim. United States v. American Surety Co. (C.C.A.) 135 F. 78; United States v. Heaton (C.C.A.) 128 F. 414. See, also, United States v. Rundle (C.C.A.) 100 F. 400; Griffith v. Rundle, 23 Wash. 453, 63 P. 199, 55 L.R.A. 381; Klein v. Collins, 159 La. 704, 106 So. 120.

"And it is the federal rule (United States Fid. & G. Co. v. United States, 209 U. S. 308, 28 S. Ct. 537, 52 L. Ed. 804, 808) that, if the bond was executed prior to the Act of February 24, 1905, 40 USCA Section 270 (expressly giving the United States priority), **the government would only be entitled to join the proration and share with other creditors**; and, if after the amendment giving the priority the amount of the government's claim, would by reason of the superior right be paid in full to the exclusion of claims of other creditors. American Surety Co. v. Lawrenceville Cement Co. (C.C.) 96 F. 25; United States v. Heaton, 128 F. 414, 63 C.C.A. 156. We hold there is no priority under the state statute that is expressed or necessarily implied."

In **Citizens Bank of Guntersville v. Pearson et al.,** 217 Ala. 391, 116 So. 350, the Court, in speaking to the question of the priority of the claim of the surety who has paid for the default of the principal, said:

"And we have stated that the surety company rests its claim to the fund on the assignment executed by Pearson at the inception of the suretyship, the express terms and conditions of the bond, which, by adoption, became an inherent part of the contract out of which the fund arises, and upon the principle of subrogation whereby a surety who is compelled to complete his principal's undertaking becomes entitled to receive the payment of the contract price in full when the same is executed by the surety.

* * * *

"Thus Pearson assigned to the surety company the right to the fund in question 'as of this date,' which was September 12, 1919, before he gave an order to the probate judge to deliver his vouchers for estimates to the bank or before he formally assigned to Whitaker, for the benefit of the bank any interest in the contract or the proceeds thereof.

"The surety company's bond was an inherent part of the contract, material to the conduct or construction of the work, and the production of the fund. It was stipulated:

'Provided, further, that upon the failure of the said L. C. Pearson to promptly and efficiently prosecute said work, in any respect, in accordance with the contract, the above bound United States Fidelity & Guaranty Company, as sureties, shall take charge of said work and complete the construction at their own expense, pursuant to its terms, receiving, however, any balance of the funds in the hands of said county due under said contract, said sureties may, if they elect so, by written direction given to said state highway engineer or said county of Marshall, Ala., authorized and require said state highway engineer or said county to complete said work according to said contract at the expense of said sureties, and such sureties hereby agree and bind themselves to pay the expenses of the completion of such work, less any funds in the hands of the county remaining due to the above bound contractor.'"

" * * * * The surety company's associate manager, Mr. Love, investigated this complaint and its duty in the premises, and found the work suspend, and intervened in the premises under its contract, and the surety company immediately obligated itself, and made payment of the bill, procured other equipment for the prosecution of the contract work, proceeded with the prosecution of the same, and to that end expended a large sum therefor without full reimbursement. Thus did the surety company become entitled to the fund thereafter earned and becoming due by specific assignment, and the express terms of the contract, and by general principles of the law of subrogation, upon full discharge of the principal's obligation."

So that, by contract, the Truck Company had agreed with its surety before any question of the State's claim against the Truck Company for taxes had arisen, that upon the failure of the Truck Company to pay for the labor, materials, feedstuffs and supplies in accordance with the contract, the surety should pay for the same, pursuant to its terms, and would receive any balance of the funds held by the State, due under said contract, to the extent necessary to reimburse the surety for sums expended by reason of the suretyship.

Under the authority cited supra, the claim of the surety against the principal, which arose out of the initial contract, was prior to any claim the State may have had,—even one which arose out of the prosecution of the project contemplated by the contract. Even more so, its claim would be superior to that of the State for any charge or item **not** within the contemplation of the construction contract.

The foregoing illustrates that no question of set-off can arise.

True, the rule as to set-off is stated generally in 59 C. J., page 320, paragraph 477, that:

"A state being sued may set off a claim it holds against plaintiff; and a commission being sued officially as representative of the state may counterclaim upon a claim of the state with reference to which it could sue as agent for the state; but where an officer is sued individually, to compel him to pay or allow a sum which it is his clear legal duty to pay or allow plaintiff, he cannot set off claims against plaintiff which are those of the state alone and on which defendant has no right to institute suit."

Of course Section 14 of the Constitution of Alabama stands as an insuperable bar to suits against the state, but the rule as to set-off would apply, nevertheless.

However here, by virtue of contract, the surety was subrogated, to the extent of sums expended on account of the suretyship, to any rights which the principal may have had in the balance due by the state, after default of the principal.

The surety's rights had accrued prior to the action by the Probate Judge in undertaking to intercept a portion of the funds in the hands of the state agency for the purpose of applying them to the principal's tax liability.

In view of these considerations, it is my opinion that, conceding, without deciding, that the Probate Judge is authorized to intercept funds in a proper case for application of the same to unpaid ad valorem tax claims of creditors of the state (compare Quarterly Report of Attorney General, Volume XVI, page 216.) Nevertheless, under the situation here presented, the claim of the surety for sums expended on account of the suretyship cannot be postponed or made inferior to such tax claims.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 7, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Fine and Forfeiture Fund—

Fees for Ex-Officers—

Where an ex-sheriff or ex-clerk has fees which have accrued against the fine and forfeiture fund of his county since his retirement from office, he is the proper person to make out such claim and certify the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 30, 1940, in which you request my official opinion as follows :

"Can an Ex-Clerk or Ex-Sheriff legally make up and file any accrued Fine & Forfeiture Claim, or should such claims that have accrued since they left office be made up and filed by the incumbent?"

I understand that in your request you are referring to fees for services rendered by the ex-clerk and ex-sheriff while in office, which fees, since their retirement from office, have become a charge against the fine and forfeiture fund of your county, under Section 4039, Code of Alabama, 1923, as amended by Act No. 53, S. 68, approved February 18, 1927 (General Acts, 1927, page 45.) This section has to do with the fine and forfeiture fund of the various counties.

Therefore, if these claims against the fine and forfeiture fund of your county are due the ex-clerk and ex-sheriff, they are the proper parties to make up these claims and certify to same. I call your attention to Section 4040, Code of Alabama, 1923, which is as follows:

"4040. **Same officer's statement under oath; when to refund.**—In cases specified in the preceding section, the officers of court must make a statement under oath of the amount of such fees due them respectively, setting out the style of each case and the term at which judgment was rendered; and if at any time such costs so enumerated, or any part thereof, shall be paid to such officers of court by the defendants, under execution or otherwise, they must refund the same to the county treasurer, who must place the amount to the credit of the fine and forfeiture fund of the county."

It is my opinion that no one else save the officers to whom these fees are due can certify under oath to the amount, etc. The fact that such fees are due ex-officers can make no difference.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1940.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Voting Machines—Consolidation of Election Districts and Precincts —Rental of voting machines—

1. Number of voting machines required under Act No. 292, S. 332, approved August 25, 1939 (Gen. Acts, 1939, p. 443), discussed.

2. Consolidation of election beats, precincts and districts under provisions of Sections 425 et seq. of the Code of 1923 discussed.

3. "Rental" of voting machines as used in Section 3(h) is annual rental.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of September 11, 1940, follows:

"Under authority of the Acts of 1930 at page 443 under the Act known as the Voting Machine Act a petition was duly filed with the Houston County Board of Revenue containing more than the required number of names and authorizing the calling of an election under said Act. Said election has been called for the date of November 5 the date of the General election. Said Act provides under Section 4, Sub-section B: that in each **voting place** in which Voting Machines are used, the County Board or City Commission should provide by rental, lease or purchase at least one Voting Machine for each six hundred registered voters or fraction thereof, therein.

"There are thirty-three voting places in Houston County in Fourteen Beats. There are approximately seventy-three hundred qualified electors in the County. There are approximately thirty-five hundred qualified electors in Beat 3.

"Please advise me as follows:

"1. How many machines will be required for Beat 3, containing thirty-five hundred votes?

"2. How many machines will be required for each of the other beats of the County which contain as many as two voting places but which have less than six hundred votes in the Beat?

"3. Is the Houston County Board of Revenue authorized to consolidate the two voting places in each Beat which contain less than six hundred votes but more than three hundred votes (Section Code 428)?

"4. Is the Board of Revenue authorized to consolidate the voting places in each Beat containing less than three hundred votes in the Beat?

"5. Where two or more Beats in the County contain less than six hundred registered voters is the Board of Revenue authorized to consolidate the voting precincts in these Beats and use only one Voting Machine to each six hundred voters?

"6. Under Section 3, Sub-head H, do you construe the rental which shall not exceed ten per cent of the purchase price to be an ANNUAL RENTAL or for each primary or election?"

My answers to the several questions contained in your request will be based on the assumption that the majority of the voters voting in the election to be held on November 5 on the question of whether or not voting machines should be used in Houston County cast their votes in favor of the adoption of voting machines. Before proceeding to answer your questions, I deem it advisable to set out those parts of Act No. 292, S. 332, approved August 25, 1939 (General Acts, 1939, page 443), and the Section of the 1923 Code which are relevant to the first five questions propounded in your letter, all of which are interrelated.

Section 29 of Act No. 292, supra, reads as follows:

"Section 29. APPLICATION OF OTHER LAWS.—The provisions of all other laws relating to the conduct of elections shall, so far as practicable, apply to the conduct of elections where voting machines are used, unless herein otherwise provided."

Section 31 of Act No. 292, supra, reads as follows:

"Section 31. REPEALER.—All acts or parts of acts, in conflict with the provisions of this act, are hereby repealed, so far as the conduct of elections in political subdivisions adopting the use of voting machines is concerned."

Subsections (a), (b), and (c) of Section 4 of Act No. 292, supra, read respectively as follows:

"Section 4. INSTALLATION OF VOTING MACHINES. (a) Where voting machines have been adopted for any county, municipality, or other political subdivision of the state, or for any portion of such county, municipality, or other political subdivision, the county board or the city commission shall, as soon as practicable and in no case later than six months after the adoption thereof, provide for each voting ward or precinct or beat designated, one or more approved voting machines, in complete working order, and shall thereafter preserve and keep them in repair. (b) In each voting place in which voting machines are used, the county board or city commission shall provide by rental, lease or purchase, at least one voting machine for each six hundred registered voters or fraction thereof, therein. (c) The county board or city commission may, at its discretion, elect not to install voting machines in any ward, precinct or beat having less than one hundred registered voters; provided that, after the adoption of the use of voting machines by any county or municipality, upon a petition signed by a majority of the registered voters in any such ward or precinct or beat, the county board or city commission may be required to install voting machines in such ward or precinct or beat for use in any election held after 90 days from the filing of such petition."

"Section 428. **Precincts or districts; how changed.**—Whenever, at any general or primary election in any election precinct or district over three hundred votes shall have been cast, the court of county commissioners or board of revenue, or other governing board of said county shall readjust the boundary lines of said election precincts or election districts and may divide or consolidate any number of precincts or districts and resubdivide the same in order that not more than three hundred voters shall be contained in any one election district."

Since Section 29, supra, states that the provisions of law relative to the conduct of elections shall apply, **only so far as practicable,** to the conduct of elections in counties where voting machines are used, and Section 31, supra, provides that all laws or parts of laws in conflict with the provisions of Act No. 292, supra, are expressly repealed in so far as their application to counties which have adopted the use of voting machines is concerned, it becomes necessary to consider the effect of the above quoted subsections of Section 4 of said act upon Section 428, supra.

While Section 428, supra, provides that the county governing body may divide or consolidate any number of precincts or districts and resubdivide the same in order that no more than 300 voters shall be contained in any one election district, subsection (b) of Section 4, supra, provides that at least one voting machine for each 600 registered voters or fraction thereof shall be provided in each voting place in the county in which voting machines are used. Consequently, it is my opinion that said subsection has the effect of substituting in Section 428, supra, 600 voters in the place of 300 voters where the same appears therein, in counties in which voting machines have been adopted.

Your first question does not admit of a definite answer, inasmuch as you do not state the number of voting places in Beat 3. From the above quoted subsections of Section 4, it is my opinion that one or more voting machines must be furnished in each ward, precinct, beat or district of the county in which voting machines are used and at least one voting machine must be furnished for each voting place in the county where voting machines are used for each 600 voters or fraction thereof in such voting place. Consequently, the minimum number of voting machines required for Beat 3 would depend on the number of voting places in Beat 3 and the number of voters in such voting places. Of course, the act places no limitation on the maximum number of voting machines that may be furnished.

If the county governing body of your county sees fit to consolidate the voting places in Beat 3 of your county, pursuant to the provisions of Section 428, supra, as amended as hereinabove discussed, so that there will not be more than 600 voters in any one voting place in said beat, then the county governing body would be required to furnish only one voting machine for each voting place therein, though more voting machines for each voting place could be furnished if the county governing body so desired.

In view of my answer to your first question, it is my opinion that if the county governing body in its sound discretion sees fit to consolidate the two voting places in the beats of your county which have less than 600 voters therein, it would be legally authorized so to do, in which event it would be required to furnish only one voting machine in such beats. However, if your county governing body does not see fit to so consolidate the voting places in such beats, then it will be required to furnish at least one voting machine for each voting place in such beats.

From what has been said hereinabove, your third and fourth questions are answered in the affirmative.

I assume from your fifth question that you wish to know whether or not the county governing body may consolidate two or more beats where such consolidation would result in there being not more than 600 registered voters in the consolidated beat. Upon this assumption, your fifth question is also answered in the affirmative by what has been said hereinabove.

You ask in your sixth inquiry whether I construe Subsection (h) of Section 3 of Act No. 292, supra, to mean that the rental therein provided for means an annual rental or a rental for each primary or election. This Subsection reads as follows:

"Section 3. REFERENDUM: ADOPTION OF VOTING MACHINES.

(h) In the event a county, municipality, or other political subdivision of the State shall vote in the majority, authorizing and directing the use of voting machines at elections as provided in Section 2 hereof, or in the event the county, municipality or other political subdivision of the state, through its proper officers, in pursuance of appropriate legislation, shall authorize and direct the use of voting machines at elections as herein otherwise provided, the county board or city commission shall either purchase the necessary number of voting machines for said county, municipality, or other political subdivision of the state under the conditions and requirements set out herein, or shall rent or lease the necessary number of voting machines for said county, municipality, or other political subdivision of the state, with or without option to purchase said machines, at fair and reasonable rental or lease prices which shall not exceed 10% of the purchase price of said machines; or such county, municipality, or other political subdivision may request the State Department of Finance to acquire the requisite number of voting machines for it under the existing provisions of law, or such county, municipality, or other political subdivision may make such request from any board, commission or authority of the State, which may now or hereafter be provided by law."

The answer to this question is not free from difficulty, but in my opinion the word "rental", as used in the above quoted Section, refers to annual rental. I reach this conclusion after a consideration of the context in which the word "rental" is used.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 10, 1940.

Hon. John W. Overton, Chief,
Markets Division,
Department of Agriculture and Industries,
The Capitol.

Licenses—Agriculture and Industries—Commission Merchant of Farm Products—

Persons who come within the definition of the term "Commission Merchant" as defined in Section 278 of the Agricultural Code of 1927 must procure license provided for in Section 280 of the Agricultural Code, supra.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

"The writer has a letter in his file from Peter C. Couch of Cullman, Alabama, Route 2, stating that he desires to obtain a license to operate a wholesale farm produce business in Cullman County, Alabama.

"Mr. Couch stated that he noticed in the 1928 Code (Michies), that the fee for such license shall be $10.00. Peter C. Couch and his sister operate a farm in Cullman County and grow part of their produce, and also handle produce for their neighbors.

"Since the writer has not issued any such license in the past eighteen months, I would appreciate your giving me a decision, whether or not, he should obtain this license under Article 25, section 280 of the Agricultural Code of 1927.

"If there is any recent law or any conflicting laws to article 25 of the Agricultural Code, I beg that you advise me."

In answering your request I am assuming that Peter C. Couch of Cullman, Alabama is selling his neighbor's farm products on a commission basis and is a "commission merchant" within the contemplation of Section 278 of the Agricultural Code of 1927.

Sections 278 and 280 of the Agricultural Code are as follows:

"Section 278. Commission Merchant.—Every person, firm, exchange, association or corporation who shall receive, sell or offer for sale on commission within this State any kind of farm products shall be deemed to be a commission merchant and engaged in the commission business. This Article shall not apply to the sale of farm products at public auction by an auctioneer acting as the agent of another to whom such farm products shall have been consigned; nor to farm products purchased outright and unconditionally, or for cash f. o. b. at point of origin; nor to dealers who buy farm products solely through solicitation by means of circulars or price lists, stating plainly on the face of such literature that they are not commission merchants, and do not make a charge against shippers for selling or handling such products, and who do not in any fashion solicit farm products on consignment to sell for the account of the shipper."

"Section 280. License Required of Commission Merchant.—No person, firm, exchange, association or corporation shall within this State engage in the commission business as a commission merchant without a license therefor. Every commission merchant shall, annually, on or before the first day of October, file an application with the Commissioner, for a license to do a commission business in farm products. Such application shall state the kind or kinds of farm products which the applicant proposes to handle, the full name of the person firm, exchange, association or corporation, the full name of each member of the firm, or the names of all the officers of the exchange, association or corporation, and the city, town or village and street number where the particular business is to be conducted. Unless the commissioner refuses the application on one or more of the grounds hereinafter provided, he shall issue to such applicant upon the payment of proper fees and the execution and delivery of a bond as hereinafter provided, a license entitling the applicant to conduct a commission business at the place named in the application until the first day of October next following. The fee for every such license shall be Ten ($10.00) Dollars."

In my opinion Section 280 of Article Twenty-Five of the 1927 Agricultural Code is in full force and effect and you should issue the license in question if the applicant complies with the requirements of said section. This is a regulatory measure passed under the states inherent police power to protect the farmers, rather than a revenue measure. Section 287 of the Agricultural Code provides as follows:

> "287. **Legislative Intent.**—It is the express intention of the Legislature, in enacting this law, to exercise to its full extent the regulatory and police powers of the State; and, where provisions occur herein, which in their broadest significance are in conflict with the Federal power to regulate commerce, it is the intention of the Legislature to confine such provisions within the competence of the State over the particular subject matter. The invalidity of one or more provisions shall not affect the remainder of this Article."

This license is similar to the license required of general contractors by the State Licensing Board for General Contractors.

Biennial Report, Attorney General, 1936-38, page 791.

You should call the applicants attention to Schedule 29 of the 1935 Revenue Act, which imposes a revenue license on commission merchants.

Yours very truly.

THOMAS S. LAWSON,

Attorney General.

October 10, 1940.

Hon. Douglas L. Cannon, M. D.,
Administrative Assistant,
Department of Health,
The Capitol.

Municipal Corporations—Tax Collectors—Sanitary Measures—

1. Municipal corporation not authorized to require County Tax Collector, collecting municipal taxes under Act No. 57, H. 183, approved February 27 1939 (Gen. Acts, 1939, page 67) to collect obligations accruing under Section 2051 of the Code of 1923 as last amended by Act No. 443, S. 247, approved September 13, 1935 (Gen. Acts, 1935, pp. 918, 925, Sec. 2051).

2. Municipal Corporation may enforce its lien under said Section 2051 as amended by bill in equity, or may maintain an action of assumpsit to recover the expenses incurred by it under said section.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated September 24, 1940 follows:

"Attached is Section 2051 of the Code of Alabama of 1923, as amended by the Acts of 1927, and as amended by the Acts of 1935, being so amended and passed in the Legislature during the regular session of 1935.

"We request your opinion on the following:

"Where a municipality has acquired liens for installing privies, water closets, or septic tanks, upon properties on which such privies, water closets, or septic tanks have been installed under the provisions of this section (and where the county tax collector now collects all taxes for the municipality) can the municipality require the county tax collector to collect the liens in the form of assessments along with the city taxes?"

In my opinion your question must be answered in the negative.

The "machinery, procedure and provisions" under Act No. 57, H. 183, approved February 27, 1939 (Gen. Acts, 1939, page 67) for assessment, equalization and collection of municipal taxes by county tax assessors are without application to obligations created under Section 2051 of the Code of 1923, as last amended (Act No. 443, S. 247, approved September 13, 1935, Gen. Acts, 1935, pp. 918, 925, Sec. 2051).

The machinery, procedure and provisions aforesaid relate only to the assessment and collection of municipal **ad valorem** taxes assessable and collectible annually.

In **Town of Leeds v. Cason,** 217 Ala. 444, 116 So. 519, it was held that an action of assumpsit would lie to recover expenses incurred by a city or town under Section 2051 of the Code, supra, the provisions thereof being an exercise of the police powers in the interest of public health, and not an exercise of the taxing power.

Under the circumstances stated in your letter, the municipality may enforce its rights by (1) filing in the office of the Judge of Probate a statement pursuant to Section 2051, supra, so as to fasten a lien on the property affected; and then (2) by filing a bill in equity to enforce such lien as authorized by Section 8935 of the Code of 1923. Or without attempting to enforce such lien, the city or town may institute an action of assumpsit against the property owner affected and recover judgment for the expense incurred by it under Section 2051, as amended, of the Code, supra, **Town of Leeds, vs. Cason, supra.**

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 14, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
The Capitol.

Costs and Fees—Fines—Clerks of Circuit Courts—Department of Corrections and Institutions—Probation—

Where one is sentenced to hard labor in lieu of payment of fine and costs imposed and sentence is suspended upon condition that fine and/or costs be paid in full or in part at a later date, upon payment, the clerk should receive the same and should make proper distribution to the department or funds entitled thereto, and is allowed commissions on such collections and remittances to the State and county respectively.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter, in which you propound certain inquiries relative to the proper procedure to be followed where monies are collected by clerks of courts in payment of fine and costs, in compliance with the orders of probation, in suspended sentence cases.

There have been several other inquiries similar in nature presented to this office. In view of the fact that your inquiry and the other similar inquiries are so interrelated, it is deemed advisable to render one official opinion covering the whole subject matter. The several inquiries presented may be consolidated into one inquiry, which is as follows:

"In case one is sentenced to hard labor to pay the fine and costs imposed, and said sentence is suspended upon condition that the defendant pay said fine and/or costs, or a part thereof, at a later date, and subsequently the monies are paid to the clerk of the court, in compliance with the probation order, what is the proper procedure relative to the acceptance of the monies by the clerk, the proper disposition thereof, and the commissions of the clerk?"

Section 4 of Act No. 278, S. 198, approved August 24, 1939, (General Acts, 1939, page 434), the Probation Act, provides as follows:

"Section 4. CONDITION OF PROBATION. The court shall determine and may at any time modify the conditions of probation and may include among them the following, or any other: That the probationer shall: (a) avoid injurious or vicious habits; (b) avoid persons or places of disreputable or harmful character; (c) report to the probation officer as directed; (d) permit the probation officer to visit him at his home or elsewhere; (e) work faithfully at suitable employments as far as possible; (f) remain within a specified place; (g) **pay the fine imposed or costs or such portions thereof as the Court may determine, and in such installments as the Court may direct;** (h) make reparation or restitution to the aggrieved party for the damage or loss cause by his offense in an amount to be determined by the Court; (i) support his dependants to the best of his ability." (Emphasis supplied)

It will be seen from the above that the Court has authority to suspend the sentence to hard labor for the non-payment of the fine or costs or any portions thereof; and permit payment of said sums in such installments as it directs. It may exercise its discretion in each particular case as to whether or not the prospective probationer should be required to pay all or part of the costs.—**Quarterly Report of Attorney General,** Volume XVII, page 40.

However, I wish to call your attention to the fact that a prospective probationer cannot be released from the payment of trial tax as a condition of probation, as said trial tax is a tax rather than cost, although collected as other costs are collected.—**State v. Montevallo Coal Mining Co.,** 197 So. 89; **Quarterly Report of Attorney General,** Volume XVII, page 40, supra.

Section 8 of the Probation Act, supra, provides as follows:

> "Section 8. Any provision of law to the contrary notwithstanding allowances, costs and fees of officers of courts and of state witnesses in any cases in which sentence is suspended and the defendant put on probation, shall be paid in the same manner and from the same fund or sources as if no suspension of execution of sentence had intervened."

In construing said section, this office, in an opinion found in **Quarterly Report of Attorney General,** Volume XVII, page 87, held that when a sentence to hard labor is suspended, the Department of Corrections and Institutions should pay the costs required to be paid under Section 3667, Code of Alabama, 1923, as limited by Section 3668, Code of Alabama, 1923, although the defendant was not delivered to said Department as required by Section 3670 of the Code of Alabama, 1923. Said opinion was based on the theory that Section 8 of the Probation Act, supra, supersedes, pro tanto, that provision of law which requires a prisoner to be delivered to the prison authorities before costs should be paid. The same reasoning is applicable to costs and fees that would be payable from the Fine and Forfeiture Fund of the county, or its equivalent, which were due officials and State witnesses that were not paid under Section 3667, supra, relative to the requirement that execution should issue and be returned "no property found" before payment could be made out of that fund. (See Section 4039, Code of Alabama, 1923, as amended.) This is true, although execution could not issue where sentence is suspended and the suspension remains in effect.—**Quarterly Report of Attorney General,** Volume XVIII, page 179.

From the above, it follows that when a hard labor sentence in lieu of fine and costs is suspended as to payment of costs, the Department of Corrections and Institutions pays those items of costs under Section 3667, supra, as limited by Section 3668, supra, and the balances due, if any, are payable from the Fine and Forfeiture Fund, or its equivalent. In the first instance, it is not necessary that the defendant be delivered to the Department of Corrections and Institutions; and in the second instance, it is not necessary that execution issue and be returned "no property found."

The question now presents itself as to what is the proper procedure to be followed when the fines or costs, as the case may be, the payment of which has been deferred by the order of probation, are subsequently paid to the clerk, in compliance with the terms of said order. When same are paid, the clerk has legal authority to accept the money so paid.—**Jordan v. State,** 23 Ala. App. 129, 122 So. 83. He should make the proper disposition of said monies as follows:

1. Fines so paid should be remitted to the Fine and Forfeiture Fund of the county, or its equivalent under the provisions of Section 4838, Code of Alabama, 1923, except that are earmarked for a particular fund, which should be remitted to that fund.

2. The monies collected for costs which are earmarked for a particular fund or department, such as solicitor's fees, stenographer's fee, which have not theretofore been paid from any source, should be remitted to the particular fund or department for which earmarked.

3. The monies collected for costs, which have theretofore been paid by the Department of Corrections and Institutions, under Section 3667, of the Code, should be remitted to that Department.

4. The monies collected for costs, which have theretofore been paid out of the Fine and Forfeiture Fund, or its equivalent, should be remitted to that fund.

5. The monies collected for particular officers and witnesses which have not theretofore been paid either by the Department of Corrections and Institutions or out of the Fine and Forfeiture Fund, or its equivalent, should be remitted to the proper officers and witnesses entitled thereto.

The foregoing conclusions are based on the reasoning in the case of **Lovelady v. Copeland,** 198 Ala. 625, 73 So. 948, in which it was held that where a convict is sentenced to hard labor for non-payment of fine and costs, and subsequently pays his costs before serving out his sentence, said costs having theretofore been paid to the proper officials from county funds, the same should be remitted to the "persons entitled thereto," which in that case was the county. In each of the above instances, the fund or funds from which the costs were paid (which costs are thereafter paid by or on behalf of the defendant) should be reimbursed to the extent of the payments out of said fund or funds, respectively. The reasoning of the opinions of this office found in Biennial Report of Attorney General, 1928-30, page 537; Quarterly Report of Attorney General, Volume III, page 188; and other opinions holding to the same effect as these two opinions, is not here applicable, as the situations dealt with in those opinions were instances where the convicts were actually delivered to the Department of Corrections and Institutions, whereas in the instant case, sentence is suspended before such delivery.

At this point, I wish to call your attention to the fact that it is the duty of the probation officer to see that the terms of probation are met; and that in cases where the defendant is allowed time to pay fine and/or costs, the probation officer should see to it that said fine and/or costs are paid within the time allotted. If not so paid, he should see that the court is appraised of the failure of the probationer to comply with the terms of probation so that proper steps are taken to the end that the probation may be revoked. See Section 6 of Act No. 278, supra. However, when the monies are paid to the clerk of the court, in compliance with the terms of probation, he should make proper remittances to the proper funds or departments, as the case may be.

I now come to the question as to whether or not the clerk would be entitled to five per cent commission for making the remittances in question.

Act No. 577, S. 291, approved July 28, 1931, (General Acts, 1941, page 669), provides as follows:

> "Section 1. That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive five per cent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected."

Said act provides for a commission of five per cent for the collection and remittance of any sum or sums collected for the **State of Alabama.** The same is sufficiently broad, in my judgment, to cover (1) those fines that are collected and paid to the State, although to the credit of a particular fund, (2) those items of costs that are paid directly into the State Treasury, and (3) those items theretofore paid under Section 3667, supra, by the Department of Corrections and Institutions and remitted to that Department. A collection for the Department of Corrections and Institutions is, in my judgment, a collection for the State of Alabama. This section deals with collections and remissions in general. The commission on solicitor's fees for the State is governed by Section 5518, Code of Alabama, 1923.

In regard to the commissions allowable for remissions to the Fine and Forfeiture Fund of the county, or its equivalent, of the monies theretofore paid out of the Fine and Forfeiture Fund, or its equivalent, it is my judgment that the clerk would be entitled to a commission under the provisions of Section 6724 (16), Code of Alabama, 1923. Such a collection, in my judgment, is a collection for the Fine and Forfeiture Fund, or its equivalent, and not a collection for the individual officers or witnesses who have theretofore received their money. Cf. **Quarterly Report of Attorney General,** Volume XI, page 103; **Quarterly Report of Attorney General,** Volume XVI, page 289.

Section 6724 (16), supra, also governs the commission allowable to the clerk on monies paid on fines and remitted to the Fine and Forfeiture Fund of the County, or its equivalent, and monies paid on items of costs earmarked for a particular fund of the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 14, 1940.

Hon. T. A. Braswell, Chairman,
Barber Commission of Mobile County,
109 St. Emanuel Street,
Mobile, Alabama.

Barber Commission—Mobile County—Local Acts, 1935, page 100—Licenses—

Act creating the Barber Commission of Mobile County and the power conferred on said Commission discussed generally.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 25, 1940, in which you request my official opinion as follows:

"An Act by the Legislature of Alabama, to define, regulate and license barbers and barber colleges, and other like businesses in Mobile County, Alabama, State of Alabama; and create a Barber's Commission for said County; and to provide a penalty for the violation of the provisions hereof, and to fix the powers and duties of said Commission. Approved September 2nd, 1935. We would appreciate an opinion on the following:—

"We have, in Mobile County, a great number of Beauty Parlors, a great number of them have barbers who cut hair in said Beauty Parlors. We understand that they are exempt under the Act where they cut hair in line with their Beauty Culture, or where it is a necessary part of their Beauty Work. Our opinion and also the opinion of Attorney General Carmichael is that where they cut hair independently and not a part of their Beauty Culture, as the fact in the case may show, that they would come under the Act of 1935, Section 1 of said Act. (Enclosed herewith is copy of that Act with Section No. 1 marked in pencil). Enclosed also you will find a copy we typed of Attorney General Carmichael's Ruling.

"We will appreciate it if you will give your prompt attention as we will want to use it during the October Grand Jury."

In answer to your inquiry, I call your attention to Sections 1 and 2 of Act No. 290, H. 817, approved September 5, 1935, (Local Acts, 1935, page 180), which provide:

"Section 1. That after the passage of this act it shall be unlawful for any person, co-partnership, association or corporation to act as a barber, operate a barber college, barber shop or other like business, to advertise or assume to act as such without a license issued by the Barbers' Commission of Mobile County. No co-partnership, association or corporation shall be granted a license, unless every member or officer of said co-partnership, association or corporation, who actively engages in the barber business, barber college or like business of such co-partnership, association or corporation, shall hold a license as a barber as hereinafter provided for."

"Section 2. A barber, barber shop, barber college or other like business within the meaning of this Act is any person, firm, partnership, co-partnership, association or corporation, who, for a valuable consideration or hire, shaves or trims the beard; gives facial or scalp massages,

or treats the same with oils or other preparations, singes, shampoos, cuts or dyes the hair of a human being, or applies hair tonic or other cosmetic preparations, clays, or lotions to the scalp, neck, or face, or engages in the teaching of any person or persons in the art of barbering as in this paragraph defined. **Provided, however, the provisions of this Act shall not apply to (1) persons engaged in the practice of medicine, surgery or beauty culture,** (2) persons actively engages in the military service of the United States Government while acting in line of duty, (3) registered nurses in the course of their employment as such, (4) persons who render any of said services to members of their immediate families, or other persons who receive such services without charge therefor." (Emphasis supplied)

You will note that under Section 2 of Act No. 290, supra, it is specifically provided "the provisions of this Act shall not apply to (1) persons engaged in the practice of medicine, surgery or **beauty culture.**" I do not find any case wherein the courts of our State have defined the words "beauty culture;" however, the Supreme Court of Florida, in the case of **Brown v. Watson,** 116 Fla. 56, 156 So. 327, speaking through Mr. Chief Justice Davis, made the following observation:

"Now what is 'beauty culture?' Chapter 14650 does not define it, so we must look to ordinary sources of knowledge for a definition, because the Legislature is presumed to have used the term as it is understood in its ordinary sense.

"In Volume 3, Encyclopedia Britannica (1933 Edition) page 281, I find the following definition of 'beauty culture', and a discussion of its importance as a national art:

"'Beauty culture is the science of improving personal appearance. It embraces the care of the skin, the hair, the hands and nails, the teeth and the body, to make them conform to the standard regarded by the current generation as beautiful.

"'Since earliest times, cosmetics have played a part in the social life of civilization. Today, specialists in beauty culture employ, diet, exercise, hygiene, electricity, X-ray, radium gland stimulations and gland extracts, water cures, sun-treatments, plastic surgery, massage, osteopathy and mental science to create health and beauty.

"'However, hygiene, sunshine, mental science, etc., constitute only a background for the specialized work of the beauty culturist. Largely, and in actual practice, beauty culture is 'the application of cosmetic preparations to the human body by slapping, stroking, massaging, kneading, tapping, stimulating, manipulating, exercising, cleansing, or by means of devices, apparatus or appliances, and arranging, dressing, marcelling, curling, waving, cleansing, singeing, bleaching, colouring, dyeing, tinting or otherwise treating by any means the hair of any person.' This inclusive definition is quoted from the Illinois law which required that anyone who practices beauty culture have a certificate of registration.'

"No doubt the Legislature, recognizing that it was impractical to intermingle the regulation of barber shops and beauty parlors, designedly used the language 'beauty culture' for the purpose of eliminating persons who practiced 'beauty culture' from the Barber Act, even though some of the acts of 'beauty culture' would amount to barbering as that term is defined in chapter 14650.

"My view is that under Section 4 of said chapter 14650, Acts of 1931, 'Persons practicing beauty culture' are wholly exempt from the barbering law and every part of it, even though they may do some of the things that would, standing alone, be within the definition of 'barbering' under section 2 of the act. All professions overlap to a degree. A physician may pull a tooth without having a dentist's license. A druggist may administer a dose of Sal Hepatica without being a physician. And so a person 'practicing beauty culture' may clip a fair lady's hair without erecting a striped pole outside her beauty shop, because clipping hair, in so far as it is merely an incident to the practice of 'beauty culture, is a part of 'beauty culture,' and is not 'barbering'.

"To adopt the view contended for by the respondent in this case simply means that many good women who are now engaged in the profession of 'beauty culture', and work single-handed in some little shop of their own where their services are dispensed only to the fair sex, must either hire a barber and open up a barber shop in connection with their beauty parlors, or else close up shop entirely and become 'hired hands' in a barber shop. For three years the barbering law has not been construed to interfere with legitimate 'beauty culturists.' The Legislature foresaw what would happen if no exception were written into the barbering law in favor of persons 'practicing beauty culture', so they specifically wrote it in the barbering law. I see no warrant for now judicially legislating to the contrary."

The provisions in the Florida Law defining a "barber" and providing for the exemptions from the provisions of the Act are identical with Act No. 290, supra. In the case of **Hoff v. State,** 197 Atlantic 75 (Del) the Supreme Court held that "the words 'beauty culture' includes any or all work done for compensation, which work, generally performed by so-called hair dressers, cosmetologists, cosmeticians, beauticians, or beauty culturists, and however denominated in so-called hair-dressing and beauty shops patronized by women, which work is for the embellishment, cleanliness and beautification of women. The occupation known as 'beauty culturists' embraces such different and unrelated work, and has such breadth, dimension and complexity of scope that it is not known with any exactness what is meant when the term 'beauty culturists' is used."

The Supreme Court of Kansas, in the case of **Keith v. Kansas Barber Board,** 212 Pacific 871, held that "the proprietor of a hairdressing and beauty parlor, the important feature of whose business includes cutting hair, massaging, clipping hair with barber clippers, singeing the hair, giving tonics, shampooing and manicuring, but not shaving the face, is not a 'barber' within the meaning of that word as used in the statute subjecting the followers of that occupation to examination and regulation."

It will be noted that since the writing of the former opinion addressed to Hon. T. A. Brassell, Chairman, Mobile Barber Commission, appearing in Vol. II, p. 237, Quarterly Report of Attorney General, other states have passed upon and defined the words "beauty culture".

Therefore, it is my opinion, under Section 2 of Act No. 290, supra, exempting from the provisions of the Act persons practicing beauty culture, that persons practicing beauty culture are wholly exempt from all of the Act although they may be doing some of the things, which stated alone, would be within the term "barber" as defined in the Act, so that a beauty culturist could clip a woman's hair without being a "barber" within the meaning of the Act, where the clipping of hair is incident to the practice of "beauty culture".

This opinion is not to be construed to be in conflict with the opinion rendered to you by my predecessor but is a ratification thereof. I think each case must stand on its own facts.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 15, 1940.

Hon. W. C. Harrison,
Associate Member,
Alabama Public Service Commission,
The Capitol.

Merit System—State Officers and Employees—Military leave and accrued annual leave—

Military leave, accrued annual leave, and status under Merit System Act, of officers and employees in the Classified and Unclassified Service of the State of Alabama who enter the active service of the armed forces of the United States, discussed generally.

Opinion by Assistant Attorney General McCall.

Dear Sir:

Your request for official opinion under date of September 19, 1940, is as follows:

"As you know, many men have recently entered, or will soon enter, the active service of the armed forces of the United States. These men include active members of the Alabama National Guard or Naval Militia, or of the Officer's Reserve Corps of the United States Army, or of the United States Naval Reserves, and men who are members of these organizations. There are officers and employees in the Alabama Public

Service Commission, as well as other officers and employees of the State of Alabama, among this number. The premises considered, I respectfully request your opinion on the following questions:

"1. If an officer or employee in the Classified or Unclassified service of the State of Alabama, who is an active member of the Alabama National Guard or Naval Militia, or of the Officer's Reserve Corps of the United States Army, or of the United States Naval Reserves, has been or is called into the active service of the armed forces of the United States, is he entitled to military or naval leave of absence, without loss of pay, for twenty-one working days, provided his service in the armed forces of the United States covers that many working days or more?

"2. If your answer to question number 1 is in the affirmative, would such officer or employee be entitled to such military or naval leave of absence, without loss of pay, if he had previously had military or naval leave of absence, without loss of pay, during the fiscal year in which he is called?

"3. Would the fact that an officer or employee in the Classified or Unclassified service of the State of Alabama, who is an active member of the Officer's Reserve Corps of the United States Army, or of the United States Naval Reserves, was called into the active service of the armed forces of the United States, pursuant to his application for active service or with his consent, affect your answer to questions numbered 1 and 2, insofar as such officer or employee is concerned?

"4. If an officer or employee in the Classified or Unclassified service of the State of Alabama, in any of the categories mentioned in question number 1 is entitled to such military or naval leave of absence, without loss of pay, does the State Personnel Board, or the State Personnel Director, or any other State official or officials, have the authority to deprive such officer or employee of his right to such military or naval leave of absence, without loss of pay?

"5. If an officer or employee in the Classified or Unclassified service of the State of Alabama, who is not an active member of any of the organizations mentioned in question number 1, voluntarily enters the active service of the armed forces of the United States, or is conscripted into the active service of the armed forces of the United States, pursuant to the provisions of the Selective Training and Service Act of 1940, would he be entitled, as a matter of right, to the same military or naval leave of absence, without loss of pay, as if he were an active member of one of such organizations?

"6. If your answer to question number 5 is in the negative, has the State Personnel Board the legal authority to provide the same status in this regard for such officer or employee as if he were an active member of one of the organizations mentioned in question number 1?

"7. If an officer or employee in the Classified or Unclassified service of the State of Alabama enters the active service of the armed forces of the United States in any of the manners described hereinabove, is he

entitled to be paid for the accrued annual leave which he has earned under the provisions of subsection (a) of Section 4 of Rule 10 of the rules of the State Personnel Board of the State of Alabama, prior to the time he enters the active service of the armed forces of the United States?

"8. If an officer or employee in the Classified service of the State of Alabama enters into the active service of the armed forces of the United States in any of the manners described hereinabove, before being given his qualifying examination by the State Personnel Board for the position which he holds in the Classified service of the State, what will his status be after the termination of his period of honorable service in the armed forces of the United States, provided he complies with Sections 2 and 3 of Act No. 651, S. 506, approved July 10, 1940?

"In connection with question number 8, your attention is called to the fact that it is probable that such officer or employee might be in the active service of the armed forces of the United States at the time his regular qualifying examination for the position which he holds in the Classified service of the State of Alabama is given, and because of such fact, might not be able to take the regular qualifying examination for his position, at that time. Please give this contingency consideration in answering question number 8."

I am of the opinion that your first inquiry should be answered in the affirmative.

Section 12 of Act No. 143, H. 63, approved April 22, 1936 (General Acts, 1936, page 105), known as the Military Code of Alabama, as amended by Section 5 of Act No. 509, H. 773, approved September 22, 1939 (General Acts, 1939, page 774), provides as follows:

"Section 12. MILITARY LEAVE FOR GOVERNMENT EMPLOYEES: All officers and employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who shall be active members of the Alabama National Guard or Naval Militia, or of the Officer's Reserve Corps of the United States Army, or of the United States Naval Reserves, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in the field or coast defense or other training or on other service ordered under the provisions of this Act, or of the National Defense Act, or of the Federal laws governing the United States Naval Reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid for more than twenty-one working days at any one time."

The active members of the Alabama National Guard or Naval Militia, or of the Officer's Reserve Corps of the United States Army, have been, or will be, called into the active service of the armed forces of the United States under the provisions of the National Defense Act, pursuant to the authority vested in the President of the United States by Public Resolution No. 96, 76th Congress, Chapter 689, 3rd Session, Senate Joint Resolution 286, approved August 27, 1940, and the active members of the United States Naval Re-

serves have been, or will be, called into the active service of the armed forces of the United States pursuant to the Federal Laws governing the United States Naval Reserves. Consequently, an officer or employee in the Classified or Unclassified service of the State of Alabama who is within the category referred to in said section, as amended, supra, when called into the active service of the armed forces of the United States in the manner hereinabove referred to, would be entitled to military or naval leave of absence, without loss of pay, for twenty-one working days, provided his service in the armed forces of the United States covers that many working days or more. See Section 13 of the Military Code of Alabama. Cf. Biennial Report of Attorney General, 1920-22, page 479.

My answer to your second inquiry is in the affirmative. Section 12, as amended, supra, specifically provides for military or naval leave of absence, without loss of pay, for not more than twenty-one working days **at any one time.** In my opinion, this clearly means that each time such officer or employee is called upon a tour of duty, he is entitled to such military or naval leave of absence, without loss of pay. If the Legislature had intended that he be entitled to only one such military or naval leave of absence, without loss of pay, in any one fiscal year, it would have been a very simple matter for it to have so expressed its intention.

My answer to your third inquiry is in the negative. Section 12, as amended, supra, does not make the military or naval leave of absence, without loss of pay, therein provided for, contingent upon compulsory service. Service under a call pursuant to application or with consent, is nonetheless service within the purview of said section.

My answer to your fourth inquiry is in the negative. Section 9 of Act No. 58, S. 44, approved March 2, 1939 (General Acts, 1939, page 68), known as the Merit System Act, provides for the adoption of rules by the State Personnel Board, and subsection (b) of said Section provides that rules adopted under said Section, not in conflict with the laws of Alabama, shall have the force and effect of law. Per contra, rules adopted under said Section, in conflict with the laws of Alabama, would not have the force and effect of law. A rule of the State Personnel Board depriving an officer or employee in the Classified or Unclassified service of the State of Alabama, of military or naval leave of absence, without loss of pay, to which he is entitled under the provisions of Section 12, as amended, supra, would be contrary to the provisions of said section, as amended, supra, and consequently would be of no force and effect. Nor am I aware of any authority of law by which any other State official or officials might deprive such officer or employee of such military or naval leave of absense, without loss of pay.

My answer to your fifth inquiry is in the negative. The military or naval leave of absence, without loss of pay, provided for in Section 12, as amended, supra, is confined, as a matter of right, to active members of the Alabama National Guard or Naval Militia, or of the Officer's Reserve Corps of the United States Army, or of the United States Naval Reserves.

My answer to your sixth inquiry is in the affirmative. Subsection (b) of Section 9 of Act No. 58, supra, provides that the rules adopted under said section shall, among other things, provide for "leaves of absence for em-

ployees in the State service; *** ". It further provides: "Such rules may include any provisions relating to state employment, not inconsistent with the laws of the State, which may be necessary or appropriate to give effect to the provisions and purposes of this Act." The purpose of the Act is stated in Section 1 thereof as follows:

> "Section 1. PURPOSE OF THIS ACT. The purpose of this act is to assure to all citizens of demonstrated capacity, ability, and training an equal opportunity to compete for service with the State of Alabama; to establish conditions in the state service which will attract officers and employees of character and capacity; and to increase the efficiency of the governmental departments and agencies by the improvement of methods of personnel administration."

A rule of the State Personnel Board providing the same status in regard to military or naval leave of absence, without loss of pay, for an officer or employee in the Classified or Unclassified service of the State of Alabama who is not an active member of the Alabama National Guard or Naval Militia or of the Officer's Reserve Corps of the United States Army or of the United States Naval Reserves, to which an officer or employee in the Classified or Unclassified service of the State of Alabama who is an active member of such organizations, is entitled, would certainly be a rule providing for "leaves of absence for employees in the State service" which would tend "to establish conditions in the State service which will attract officers and employees of character and capacity." Under subsection (d) of Section 4 of Rule 10 of the Rules of the State Personnel Board of the State of Alabama provision has been made for military or naval leaves of absence for officers and employees in the Classified or Unclassified service of the State of Alabama, who come within the purview of Section 12, as amended, supra, whereas no such provision is made for any other officer or employee in the Classified or Unclassified service of the State. However, the manner for the adoption of an amendment to such rules to make such provision is set out in subsection (a) of Section 9, supra, which is as follows:

> "Section 9. RULES. (a) The Director shall recommend such rules as he may consider necessary, appropriate, or desirable to carry out the provisions of this Act, and may from time to time recommend amendments thereto. When such rules or amendments are recommended by the Director, the Board shall hold a public hearing thereon, and shall have power to approve or reject the recommendations of the Director wholly or in part or to modify them and approve them as so modified. Rules or amendments thereto which are approved by the Board, or on which the Board takes no action within thirty days after they are recommended by the Director, shall be submitted to the Governor by the Director, who shall have power to approve or reject them. Such rules or amendments thereto shall become effective when approved by the Governor, or on the tenth day after they are submitted to him if prior thereto he shall not have rejected them. The first rules hereunder shall be recommended by the Director within six months after his appointment."

My answer to your seventh inquiry is in the affirmative. Subsection (a) of Section 4 of Rule 10 of the Rules of the State Personnel Board of the State of Alabama reads in pertinent part as follows:

"(a) Annual Leave: Each permanent employee, with regular civil service status, other than those employed by the hour or day, shall be entitled to annual leave, with pay, in the amount of twelve working days in each calendar year, or one such day in each completed month from the date of appointment until the end of the current calendar year. Such regular employees rendering part time, seasonal, or intermittent service shall be entitled to such leave at the same rate for the time actually worked.

* * * * * * *

"Employees may utilize their allowances of annual leave on the basis of application therefor, approved by their respective appointing authorities, at such time as they prefer, subject always to the right of the appointing authorities to plan the work under their control and to authorize absences only at such times as the employees can best be spared.

"Persons must have been in the State service a minimum of three months immediately preceding any annual leave.

* * * * * * *

"No accumulations of annual leave, from year to year, shall be allowed except as follows: If the appointing authority finds it impossible to grant an employee his leave of absence during a calendar year without seriously interfering with the operations of his department, he may, by special request to the Director, be given permission to allow an employee to carry over one year's leave into the next year. The request to do this, however, with reasons therefor, must be approved before the end of the year from which leave is to be carried forward."

In my opinion an officer or employee in the Classified or Unclassified service of the State of Alabama, who has accrued annual leave which he has earned under the above quoted provision of the Rules of the State Personnel Board of the State of Alabama, at the time he enters the active service of the armed forces of the United States in any of the manners described hereinabove, should be paid therefor at his regular rate of pay.

In answer to your eighth inquiry, it is my opinion that an officer or employee in the Classified service of the State of Alabama who enters the active service of the armed forces of the United States in any of the manners described hereinabove does not lose such status by reason of his entry into the active service of the armed forces of the United States. If such officer or employee complies with the provisions of Section 2 of Act No. 651, S. 506, approved July 10, 1940, it is mandatory upon the State Personnel Board to grant such officer or employee an indefinite leave of absence for such length of time as he is honorably serving in any of the armed forces of the United States. Under Section 3 of said act, such officer or employee, at any time before the expiration of twelve months after the termination of his period of honorable service in any of the armed forces of the United States, may apply in writing to the State Director of Personnel for the termination of his leave of absence, and, within thirty days of the filing of such application, the State Personnel Board shall consider the same, and if the mental and physical condition of the applicant are such that he is not disqualified to

perform the duties of such position from which he had leave of absence, it shall thereupon order his restoration to said position, effective upon the date on which the said order is made and entered. Such restoration shall be made notwithstanding the fact that it results in the lay-off of the incumbent who is serving in such position. See also Section 3 of Public Resolution No. 96, supra, and Section 8 of Public Laws No. 783, 76th Congress, Chapter 720, 3rd Session, Senate 4164, approved September 16, 1940, the Selective Training and Service Act of 1940.

If such officer or employee in the Classified service of the State of Alabama enters the active service of the armed forces of the United States before the regular qualifying examination for the position which he holds in the Classified service of the State of Alabama is given, and such regular qualifying examination is given during his absence, and he is unable to take the same because of his service in the armed forces of the United States, in my opinion he should be given a qualifying examination for such position as soon as feasible after his restoration to such position under the provisions of Section 3 of Act No. 651, supra. Such qualifying examination should be of the same type and character as the regular qualifying examination for such position which was given in his absence, and such officer or employee should be treated in all respects as though he had taken the regular qualifying examination for his position which was given in his absence. Such is in accordance with the plain and clearly expressed intention of the Legislature in the enactment of Act No. 651, supra.

In the preparation of this opinion, the fact that Act No. 552, S. 338, approved September 18, 1939 (General Acts, 1939, page 872), was passed subsequent to Act No. 509, supra, amending Section 12 of the Military Code of Alabama, has been considered. However, it is my opinion that Act No. 552, supra, did not repeal, or in any manner affect, the provisions of Section 12 of the Military Code of Alabama, as amended, supra. Said acts were passed at the same session of the Legislature and must be construed in pari materia, and, in my opinion, they are not in conflict, but each has a field of operation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 15, 1940.

Hon. W. H. MacGregor,
Secretary-Treasurer,
Teachers' Retirement System,
Montgomery, Alabama.

Schools—Teachers' Retirement System—Mobile County—Section 270 of the Constitution of 1901—

The provisions of Act No. 419, S. 362, approved September 15, 1939 (General Acts, 1939, page 559), held applicable to Mobile County.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of September 3, 1940, in which you request my official opinion as follows:

"RE: Request for an opinion regarding the status of employees of the Board of School Commissioners of Mobile County under the provisions of the Teachers' Retirement System Act.

"On September 15, 1939 the Governor approved a bill (No. 419—S. 362—Young), 'To provide a retirement fund for aged and incapacitated teachers in the State supported schools; to establish a teachers' retirement system; to determine membership and conditions of membership in said system; to provide for a board of control of said system and for the administration of its affairs; to provide for the adoption of mortality, service and other actuarial tables as may be deemed necessary; to provide for the management of the funds of the said system; and to provide a method of financing said system.'

"Section No. 270 of the Constitution of Alabama, Article 14 provides as follows:

" 'The provisions of this article and of any act of the legislature passed in pursuance thereof to establish, organize, and maintain a system of public schools throughout the state, shall apply to Mobile County only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation as now authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature; provided, that separate schools for each race shall always be maintained by said school authorities.'

"I wish particularly to call your attention to the following sections of the Teachers' Retirement System Act which are quoted in part, as follows:

" 'Section 8. METHOD OF FINANCING. All of the assets of the retirement system shall be credited according to the purpose for which they are held among six funds, namely, the Annuity Reserve Fund, the Pension Accumulation Fund, the Pension Reserve Fund, the Pension Fund, and the Expense Fund.'

" 'Section 7. MANAGEMENT OF FUNDS. (1) The Board of Control shall be the trustees of the several funds created by this act as provided in Section 8, and shall have full power to invest and reinvest such funds, subject to all the terms, conditions, limitations, and restrictions imposed by the laws of Alabama upon domestic life

insurance companies in the making and disposing of their investments; and subject to like terms, conditions, limitations and restrictions, the Board shall have full power to hold, purchase, sell, assign, transfer and dispose of any of the securities and investments in which any of the funds created herein shall have been invested, as well as the proceeds of said investments and any moneys belonging to said funds.'

"'Section 6. DUTIES OF ACTUARY. (12) The Board of Control shall designate an actuary who shall be the technical adviser of the Board of Control on matters regarding the operation of the funds created by the provisions of this act, and shall perform such other duties as are required in connection therewith. (13) Immediately after the establishment of the retirement system the actuary shall make such investigation of the mortality, service, and compensation experience of the members of the system as he shall recommend and the Board of Control shall authorize, and on the basis of such investigation he shall recommend for adoption by the Board of Control such tables and such rates as are required in Subsection (14), Paragraphs (a) and (b), of this section. The Board of Control shall adopt tables and certify rates, and as soon as practicable thereafter the actuary shall make a valuation based on such tables and rates, of the assets and liabilities of the funds created by this act. (14) In the year nineteen hundred and forty-three, and at least once in each five-year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the retirement system, and shall make a valuation of the assets and liabilities of the funds of the system, and taking into account the results of such investigation and valuation, the Board of Control shall: (a) Adopt for the retirement system such mortality, service and other tables as shall be deemed necessary; and (b) Certify the rates of contribution payable by the State under the provisions of this act.'

"Subdivision (c) of Sub-section 3 of Section 8. 'The actuary engaged by the Board to make each valuation required by this act shall, immediately after making such valuation, determine the normal contribution rate by deducting from the total liabilities of the Pension Accumulation Fund the amount of the funds in hand to the credit of that fund and dividing the remainder by one per centum of the present value of the prospective future salaries of all members as computed on the basis of regular interest and the mortality and service tables adopted by the Board of Control.'

"Subdivision (c) of Sub-section 7 of Section 8. ' . . . . The amounts appropriated by said act or acts, or such parts thereof as may be available in case the full amount is not available in any year, shall be paid to this retirement system each year and deemed expended in the year, by first crediting to the Expense Fund a sum not in excess of ten thousand dollars in each year, next by crediting to the Pension Accumulation Fund the amount ascertained by the Board of Control to be due to such fund, and the balance to the Pension Fund. Notwithstanding anything to the contrary in this act, the payment of pensions from the Pension Fund shall be limited to the amounts available to the fund for this pur-

pose. Provided, however, that any provision of this act to the contrary notwithstanding, the contribution provided to be made by any of said employers to the Pension Accumulation Fund, the Pension Fund, and the Expense Fund, shall be payable only out of said teachers' retirement fund in the manner herein provided, and said employers, other than the State of Alabama, shall not in any event be called upon to pay any such contribution from any appropriations or other moneys or funds of such employers.'

"I would like to have an opinion as to whether the employees of the Board of School Commissioners of Mobile County are covered under the provisions of the Teachers' Retirement System as are the teachers who serve under employment of the boards of trustees of the University of Alabama, the Alabama Polytechnic Institute and the Alabama College.

"If you should hold that the employees of the School Commissioners of Mobile County are not covered under the provisions of the Teachers' Retirement System Act, I should then like to have your opinion in response to the following questions:

"Question 1—Section No. 270 of the Constitution of Alabama provides, in part, as follows: 'To authorize and require the authorities designated by law to draw the portion of funds to which said county shall be entitled.'

"Will not the Board of Control of the teachers' retirement system fully meet the constitutional provision supra, when such board credits to the various funds of the retirement system as defined, supra, the amounts calculated on the basis of the membership of public school teachers employed by the school commissioners of Mobile County who may elect to become members of the retirement system?

"Question 2—In order to secure the maximum benefits provided under the provisions of the Teachers' Retirement System Act, is not the Board of School Commissioners of Mobile County authorized to adopt a resolution declaring that the provisions of said Act shall cover all teachers employed by said board?

"Question 2A—If you should hold (1) that the employees of the Board of School Commissioners of Mobile County are not covered under the provisions of the Teachers' Retirement System Act; but (2) that the Board of School Commissioners of Mobile County is authorized to adopt a resolution declaring that the provisions of said Act shall cover all teachers employed by said board, then I should like to have your opinion in response to the following question, viz: Unless and until the Board of School Commissioners of Mobile County does take appropriate action to cover all teachers employed by said board under the provisions of said Teachers' Retirement System Act, is there any duty on the Board of Control or any other State Authority to draw any portion of funds as the portion to which Mobile County is entitled? In other words, if Mobile County has the option to come under said Act or not, then by electing not to come under said Act, does it not waive any right to any of the funds provided by said Act?

"Question 3—Subdivision (b) of Sub-section 7 of Section 8 provides as follows: 'The collection of members' contributions shall be as follows: Each county and city board of education; the State Board of Education, the governing boards of the University of Alabama, the Alabama Polytechnic Institute, and Alabama College; and the Executive Committee of the Alabama Education Association shall cause to be deducted on each and every payroll period subsequent to the date of the establishment of the retirement system the contributions payable by each member as provided in this act. Each employer shall transmit monthly, or at such time as the Board of Control shall designate, the total amount so deducted to the Secretary-Treasurer of the Board of Control accompanied by an itemized statement of the contributions of each individual member of the retirement system . . . . '

"I should like to have your opinion as to whether the Board of School Commissioners of Mobile County would not be required to deduct from each and every payroll the contribution due to the teachers' retirement system by each employee of said board who elects to become a member of the system, and to transmit monthly to the Secretary-Treasurer of the Board of Control the total amount so deducted."

My answer to your first inquiry is in the affirmative.

The sole question presented in your inquiry is whether or not Act No. 419, S. 362, approved September 15, 1939 (General Acts, 1939, page 559), commonly referred to as the Teachers' Retirement Act, is applicable to Mobile County in view of the provisions of Section 270 of the Constitution of 1901. Said Section reads as follows:

"Section 270. The provisions of this article and of any act of the legislature passed in pursuance thereof to establish organize, and maintain a system of public schools throughout the state, shall apply to Mobile county only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation as now authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature; provided that separate schools for each race shall always be maintained by said school authorities."

The Court of Appeals of this State, in the case of **Graham v. City of Mobile,** 17 Ala. App. 19, 81 So. 355, considered an act passed by the Legislature in 1915, which act was to compel the attendance at school of children within certain ages in the State. It was contended that in view of Section 270 of the Constitution of Alabama, 1901, this act was not applicable to Mobile County. It was further insisted that the Board of School Commissioners of Mobile County is a thing apart, with a separate identity, and with no connection whatever with the general laws governing and applicable to the public school system of the State, or the general laws governing and applicable to the attendance of school children of the State. Counsel for defendant also insisted in this case that Section 270 of the Constitution prescribed this separate identity free from interference by the Legislature of Alabama.

The Court of Appeals, with full knowledge of the separate identity of the Mobile County school system in mind, speaking through Judge Samford, said:

> "There is no limitation or exception as to children in the territory of the county of Mobile, and it requires no argument or authority to say that this act is not in any manner in conflict with section 270 of the Constitution. The city and county of Mobile are a part of the commonwealth of the state of Alabama, and all general acts of the Legislature are applicable alike to it, unless such acts contravene a provision of the Constitution intended to preserve some special institution within its confines."

The Court of Appeals, in the above quotation, sets out no reason why the act considered in the Graham case, supra, was not in conflict with Section 270 of the Constitution. However, in my opinion, this statement was made for the obvious reason that the act of the Legislature considered by the Court was not an act passed by the Legislature to "establish, organize and maintain a system of public schools throughout the State."

On the authority of the Graham case, supra, you are advised that in my opinion Act No. 419, supra, applies to Mobile County, as well as to the several other counties of the State. The Teachers' Retirement Act, in my opinion, like the act considered in the Graham case, is not an act passed by the Legislature of this State to "establish, organize and maintain a system of public schools throughout the State."

Since my answer to your first inquiry is in the affirmative, it is not necessary for me to answer the other inquiries set out in your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1940.

Hon. J. L. Bowden,
Sheriff, Monroe County,
Monroeville, Alabama.

Jailer for County Jail—

It is not compulsory that a sheriff appoint a jailer for the county jail, but he must appoint a night watchman for said jail unless there has been a written order from the State Department of Corrections and Institutions to the contrary.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 9, 1940, in which you request my official opinion as follows:

"Please give me a ruling on Jailer for County Jail. Is it compulsory that there be a jailer or not?"

If, by your request, you refer to the "jailer" whom the Sheriff is authorized to appoint under Section 4801, Code of Alabama, 1923, then it is my opinion that your inquiry should be answered in the negative, i.e., it is not compulsory that the sheriff appoint a jailer. You will note that Section 4801 provides:

"4801. Legal custody and charge of jail.—The sheriff has the legal custody and charge of the jail in his county, and all prisoners committed thereto (except in cases otherwise provided by law), and may appoint a jailer for whose acts he is civilly responsible." (Emphasis supplied)

You will see that, while the foregoing section authorizes the sheriff to appoint a jailer, it does not require that he do so.

If, by your request, you are seeking my opinion as to whether it is compulsory that you appoint a night deputy, whatchman or attendant, then your request must be answered in the affirmative. In this connection, your attention is called to Section 4879 of the Code of Alabama, 1923, which requires that unless there is a written order from the State Prison Inspector to the contrary, you must have a night deputy, watchman or attendant. This section is as follows:

"4879. Deputy or watchman must be in attendance.—Prisoners shall not be confined in any jail or prison in this state when such jail or prison is not provided with a deputy, watchman or attendant, whose duty it shall be to watch the jail or prison at night for the prevention of escapes, and fire, and to aid in cases of sickness among the prisoners, and who shall have access to the jail or prison and to the prisoners. If the state prison inspector is satisfied, after inspection, that the construction and management of a jail is such as to render a night watchman unnecessary, he may by written order to the sheriff suspend the appointment of such watchman, this order to be subject to revocation at the discretion of the prison inspector. The sheriff, in case of a county jail, or the proper governing authority, in case of a municipal jail, shall appoint, direct and control said deputy, watchman or guard, and the court of county commissioners or board of revenue, or the municipal governing authority, as the case may be, shall fix a reasonable salary and the same shall be paid out of the funds of the county or of the municipality, if it be a town or city jail, in which the jail is located."

Cf. Biennial Report of Attorney General, 1936-38, page 771, Biennial Report of Attorney General, 1934-36, page 576.

May I also call your attention to the fact that the office of State Prison Inspector has been abolished and the duties devolving upon that office or agency have been conferred upon the State Department of Corrections and Institutions by Act No. 91, H. 261, approved March 1, 1939, General Acts, 1939, page 118. It will therefore be necessary that the written order required

by Section 4879 be given by the State Department of Corrections and Institutions rather than by the State Prison Inspector.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 17, 1940.

Hon. Stewart J. Lloyd,
State Oil and Gas Supervisor,
University, Alabama.

Appropriations—Lapsing of Appropriations—

Under the provisions of Section 11 of Act No. 144, S. 34, approved March 16, 1939 (General Acts, 1939, page 190), all unencumbered balances of all appropriations revert to the State Treasury at the end of the fiscal year, and to the credit of the general fund, or the special fund from which such appropriation was made.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated October 4, 1940, follows:

"The question has arisen whether the money received for 'Drilling Permits' goes into the general fund if unexpended at the end of the fiscal year. Mr. Heck thought not, as it was not an appropriation, but suggested that I secure an opinion from you. Senate Bill 364 (Oliver Young) carries the section requiring these permits."

My answer to your inquiry is in the negative.

The act to which you refer is Act No. 645, S. 364, approved July 10, 1940 (Pamphlet). Subhead 2 of Subsection (c) of Section 6 of said act reads as follows:

"To require the person desiring or proposing to drill any well in search of oil or gas, before commencing the drilling of any such well, to notify the State Geologist upon such form as the State Geologist may prescribe and to pay to the State Treasurer a fee of $25.00 for each such well. The drilling of any well is hereby prohibited until such notice is given and such fee has been paid as herein provided. The State Geologist shall have the power and authority to prescribe that the said form indicate the exact location of such well, the name and address of the owner, operator, contractor, driller, and any other person responsible for the conduct of drilling operations, the proposed depth of the well, the elevation of the well above sea level, and such other relevant infor-

mation as the State Geologist may deem necessary or convenient to effectuate the purposes of this Act. All funds paid to the State Treasurer pursuant to the provisions of this section shall be disbursed by the State Treasurer upon warrants drawn by the State Geologist for the purpose of defraying expenses incurred by the State Geologist in the performances of his duties under this Act."

It is my opinion that the Legislature, by the provisions in Subhead 2, supra, intended to create a special fund in the State Treasury, to be used by the State Geologist in defraying his expenses incurred in the performance of his duties under the act, this special fund being composed of the $25 permit fees for drilling oil and gas wells. It is also my opinion that the Legislature, by the provisions of Subhead 2, supra, intended to appropriate so much of the special fund created by this section as might be necessary to defray the expenses of the State Geologist in performing the duties imposed upon him by the act under consideration. Cf. Quarterly Report of Attorney General, Vol. XV, page 271.

Section 11 of Act No. 144, S. 34, approved March 16, 1939 (General Acts, 1939, page 190), reads as follows:

"Section 11. That Section 22 of said Budget and Financial Control Act be and it hereby is amended to read as follows: 'Section 22. LAPSING OF APPROPRIATIONS. All unencumbered balances of all appropriations shall revert to the State Treasury at the end of each fiscal year and to the credit of the General Fund or the Special Fund from which the appropriation or appropriations were made. Appropriations for the purchase of land or the erection of buildings or new constructions shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made."

In view of the above quoted section, you are advised that in my opinion the unexpended balances of the appropriation here considered will not revert to the General Fund of the State, but, on the contrary, will revert to the Special Fund from which this appropriation was made, and may be used from year to year for the purpose for which the Special Fund was created.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1940.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Counties—Destitute Children—

Commissioners Court of Clarke County may make appropriations from the general fund to a cafeteria project operated at a school house to furnish noon meals to destitute children.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated October 14, 1940 follows:

"Please advise me if Clarke County can legally make a donation to a cafeteria project operated at a school house for the benefit of furnishing noon meals to children who are in destitute condition."

In my opinion, the Court of County Commissioners of Clarke County may make appropriations from the general fund to a cafeteria project operated at a school house to furnish noon meals to destitute children.

Section 6755 of the 1923 Code of Alabama, as amended, provides in part as follows:

"6755. The court has authority— * * * 6. To make such rules and regulations for the support of the poor in the county as are not inconsistent with any law of the state."

In construing section 6, supra, this office has held that commissioners courts may make appropriations from the general fund to the State Board of Education to be used by said Board for the relief of needy (poor) crippled children in the county donating such monies. See Vol. XIX of the Quarterly Reports of the Attorney General, page 138.

I wish to quote from this opinion as follows:

"The Supreme Court of Alabama, in construing this grant of authority, has held that the governing body of the county, in providing for the support of the poor, is clothed with large powers, partly akin to each of the great divisions of governmental powers and with large discretion in the exercise of those powers — it is the sole judge of the mode and measure of relief to be granted, and is not confined to the inmates or instrumentalities of the county poorhouse. **Henry v. Cohen,** 66 Ala. 382. In the Cohen case, the question was presented as to the legality of the payment by the county for corn purchased and distributed to the poor generally, at their residences in the county, outside of the poorhouse of

the county, and not to the poor in the county poorhouse. The court, speaking through Mr. Justice Stone, upheld the legality of such a payment."

* * * * * * *

"'It is contended for appellant, that the power of the Court of County Commissioners to provide for the support of the poor, is limited to inmates of the poorhouse. This is too narrow a construction. **The entire power and jurisdiction over this very important function and duty of government is confided to this necessary and useful tribunal.** It is clothed with large powers, partly akin to each of the three great departments into which government is divided, and it is clothed with large discretion in their exercise. True, in the exercise of statutory, judicial powers, and in pronouncing judicially on the property rights of others, it is a court of limited jurisdiction, and its proceedings are to be tested by the intendments which pertain to stautory, limited jurisdictions.—2 Brick Dig. 400, Section 14. But, **in the matter of levying taxes, and making provision for the support of the poor, these rules do not apply.**—Perry County v. Selma, Marion and Memphis Railroad, at the last term. **That court, in making provision for the poor, are sole judges of the mode and measure of relief, and are not restricted to the confines or instrumentalities of the poor-house.**—City of Lowell v. Oliver, 8 Allen 247; Freeland v. Hastings, 10 Allen 550; Booth v. Town of Woodbury, 32 Conn. 118; Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518. * * * '"

The Courts of County Commissioners may make appropriations for the relief of storm sufferers whose homes and personal belongings were recently destroyed by storm.—Biennial Report of Attorney General, 1932-34, page 532.

In my opinion, the right to make rules and regulations for the support of the poor in the county gives the county governing body the right and power to determine the particular projects necessary to care for the poor in the county and when your county governing body determines that the cafeteria project is a proper method for caring for the poor children within the county, then the governing body may legally make a donation from the county general funds to the cafeteria project.

In answering your question, I am assuming that you wished to make the donation from the general funds of the county.

If you wish to make the donation from your special funds derived from the Sales Tax Act or the Alabama Beverage Control Act, I refer you to the following opinions of this office relative to the same:

Quarterly Report, Attorney General, Vol. XVII, p. 249;

Quarterly Report, Attorney General, Vol. XIV, p. 197;

Biennial Report 1936-38, page 682.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1940.

Hon. M. A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Licenses—Schedule 20 of General Revenue Act of 1935, as amended by Act No. 597, H. 479, approved June 28, 1940.

Owners or operators of a battery shop not liable for license under Schedule 20, as amended, unless they are engaged in repairing, recharging, and selling batteries, and rendering a complete battery service.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 14, 1940, in which you request my official opinion as follows:

"Re: License Schedule 20—Batteries.

"The above Schedule pertains to licenses required of battery shops for selling, recharging and repairing batteries. The foot note on this Amendment states 'Provided this license shall not apply to businesses not rendering a complete battery service'. There are some battery shops who recharge and sell, but do not repair batteries. On the other hand there are some battery shops that recharge and repair, but do not sell batteries. There are other shops who do not keep batteries in stock, but will obtain a battery from one of the wholesale dealers to re-sell to the retail customer, the customer in turn receives a full and complete battery service for the length of the guarantee that usually accompanies such sale. As a matter of fact there are very few battery shops that repair.

"We would appreciate your opinion as to just which one or more, or all, constitute a 'complete battery service!"

I call your attention to Act No. 597, H. 479, approved June 28, 1940 (pamphlet) which provides:

"Section 1. That Schedule 20 of Article XIII, Chapter 1 of an Act entitled 'An Act to provide for the General Revenue of the State of Alabama,' approved July 10th, 1935, be and the same is hereby amended to read as follows: Schedule 20. **Each Battery Shop for the repairing, recharging and selling batteries** in cities and towns of:

"Over 60,000 ..... $20.00

16,000 to 60,000 ..... 15.00

5,000 to 15,000 ..... 10.00

"All other places whether incorporated or not ..... $ 5.00

"Provided that this license shall not apply to businesses not rendering complete battery service." (Emphasis supplied.)

The above quoted Act is entirely different from Schedule 20 as it appeared in the Revenue Act of 1935, as in that Act it was provided:

"Schedule 20. Each BATTERY SHOP for the repairing, recharging or selling batteries in cities and towns of:

"Over 60,000 ..... $20.00

15,000 to 60,000 ..... 15.00

5,000 to 15,000 ..... 10.00

All other places whether incorporated or not ..... $ 5.00"

It will be noted that the word "or" in the original Act has been changed to the word "and" in the amended Act, and also the following proviso has been added as a part of the amended Act: "Provided that this license shall not apply to businesses not rendering complete battery service".

"Taxing statutes should be strictly construed in favor of the tax payer and against the taxing power". **Hill Grocery Co. vs. State,** 26 Ala. App. 302, 159 So. 269; **State vs. Pullman Standard Car Mfg. Co.,** 235 Ala. 493, 179 So. 541.

A change in the General Revenue Law, giving clear meaning to the law, can be considered by the Court of Appeals in construing a prior general law. **Azar vs. State,** 27 Ala. App. 49, 166 So. 811.

In the construction of statutes, the last expression of the legislative will must prevail. **Fidelity and Deposit Company of Maryland vs. Goodwin,** 231 Ala. 44, 163 So. 341.

In construing an Act, the courts cannot ignore the express language used. **Southern Industrial Institute vs. Lee,** 234 Ala. 404, 175 So. 365.

The premises considered, it is my opinion that (1) the owner or operator of a battery shop who "recharges and sells" batteries only would not be liable under the above mentioned amended Schedule for the reason that said owner or operator does not "repair" batteries. In other words, unless the battery shop "repairs, recharges and sells batteries", it would not come within the provisions of Act No. 597, supra. (2) Those battery shops that "recharge and repair" batteries, but do not "sell" batteries, are not liable for a license under Act No. 597, supra. (3) The mere fact that the battery shop does not keep any batteries in stock for sale is of no consequence if the owner or operator of a battery shop obtains a battery and resells to the customer. This would amount to a sale under the terms of the Act. However, if the owner or op-

erator of a battery shop merely "sells" and does not "repair and recharge" batteries, the owner or operator of the battery shop would not be liable for the license under Act No. 597, supra. If the owner or operator of the battery shop "sells" a battery, and the guaranty includes "repairing and recharging", and the battery shop actually "repairs and recharges" a battery pursuant to the guaranty, then, in my opinion, the owner or operator of the battery shop would be liable for the license provided under Act No. 597, supra. He must actually do all of the three things mentioned in the Act, that is, (a) shall "sell"; (b) "repair"; and (c) "recharge" the battery. If any one of the three things are not done by the owner or operator of the battery shop, then, there is no liability for the license provided.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1940.

Hon. W. H. Holcombe, Sheriff,
Mobile County,
Mobile, Alabama.

Mobile County—Inferior Criminal Court—Guarding Prisoner in Hospital—Costs and Fees—Sheriffs—

1. Inferior Criminal Court of Mobile is not a justice of the peace court, and sheriff's fees for services rendered in said court are governed by the provisions of Section 3741, Code of Alabama, 1923.

2. Fees accruing to sheriff for services in Inferior Criminal Court of Mobile County on preliminary hearing, where defendant is discharged, or is bound over to the grand jury, and grand jury fails to indict, are not legal claims against the county.

3. Fees claimed by guards for guarding prisoners while confined in hospital are legal claims against county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for an official opinion under date of March 28, 1940, which follows:

"I wish to have your opinion upon the following questions:

"1. Is the Inferior Criminal Court of Mobile County a justice of the peace court within the meaning of the decision of Hawkins v. State, 124 Alabama, 102?

"2. Are the Sheriff's fees from the Inferior Criminal Court of Mobile County, Alabama governed by the laws applicable to fees earned in justice of the peace courts?

"3. Where a defendant is charged with a felony in the Inferior Criminal Court of Mobile County, and upon a hearing in that court, is discharged, is the sheriff entitled, out of the county treasury, to a fee of $4.00 for executing the felony warrant, a fee of $1.00 for approving the bond, a guard fee of $2.00 and a witness fee of fifty cents each for subpoenaing state witnesses?

"4. Where a defendant is charged with a felony in the Inferior Criminal Court of Mobile County, and upon hearing in said court is bound over to the grand jury and the grand jury fails to indict, is the sheriff entitled to the fees set out in question 3, payable out of the County treasury? In other words does not the failure of the Grand Jury to indict, and its subsequent order to the Sheriff to discharge the prisoner constitute in effect a discharge by the Circuit Court?

"5. Where the Sheriff has secured an order of the Circuit Court to hire a guard for a prisoner in a hospital, is the County liable for the pay of that guard, and if so, in what amount per day?"

This office, in an opinion to Hon. S. H. Smith, Clerk of the Circuit Court of Mobile County, under date of July 3, 1935, answered both your first and second inquiries in the negative. In this opinion, it was held that the Inferior Criminal Court of Mobile County has jurisdiction greatly in excess of that conferred on justice of the peace courts, and said Court was not created in lieu of justice of the peace courts in Mobile County. It was also held in this opinion that the fees of the Sheriff of Mobile County were governed by the provisions of Section 3741 of the Code of Alabama, 1923, which section contains the schedule of fees for services under the general law, and not the provisions of Section 3753 of the Code of 1923, which section contains the schedule of fees applicable to justice of the peace courts. The opinion above referred to appears on page 20 of Volume 5-A, Opinions of the Attorney General, Office Edition, a copy of which is herewith enclosed.

You are, therefore, advised that it is my opinion that the Inferior Criminal Court of Mobile County is not a justice of the peace court, and the sheriff's fees for services rendered in said court are governed by the schedule of fees provided for by Section 3741 of the Code of Alabama of 1923, and not by the schedule of fees provided for by Section 3753 of the Code. Cf. Opinions of the Attorney General Office Edition, Volume 4-A, page 59, a copy of which is enclosed.

Your third and fourth inquiries are so interrelated that I shall proceed to answer both of them together.

My answer to both your third and fourth inquiries is in the negative.

As has been pointed out above, your fees for services rendered in the Inferior Criminal Court of Mobile County are governed by the general law of the state—namely, Section 3741 of the Code of 1923.

All of the fees referred to in your third and fourth inquiries are fees provided for and enumerated in Section 3741.

Under the authority of the case of **Kilgore v. Swindle, County Treasurer,** 219 Ala. 378, 122 So. 333, it is my opinion that you are not entitled to payment out of the county treasury of the fees set out above, which accrue on preliminary hearing in the Inferior Criminal Court of Mobile County, where the defendant is discharged, or is bound over for action of the grand jury and the grand jury fails to indict him.

My answer to your fifth inquiry is in the affirmative.

This office, in an opinion rendered to hon. J. W. Sharpton, President, Board of Revenue of Etowah County, under date of July 12, 1939, ruled that compensation for a guard while guarding a prisoner confined to a hospital was a legal claim against the county, and such compensation could be paid out of county funds. This opinion appears on page 32 of Volume XVI of Quarterly Reports of the Attorney General. It is my opinion that the amount of such compensation is a question which addresses itself to the sound discretion of the county governing body, and such governing body should allow an approved payment of any reasonable compensation for such guard.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1940.

Hon. W. L. Baker, President,
City Commission,
Talladega, Alabama.

Schools—City Board of Education—Vacation of Office—

A member of a City Board of Education who ceases to be a resident of said City automatically vacates his place on the City Board of Education.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion date October 12, 1940, follows:

"Would you please give us a ruling on the following.

"We have a member of the school board that has moved from our city selling his home, and working for an out of town concern. He has moved his family and has let it be known that he does not intend to

remove back to Talladega. He, however, has not resigned from the School Board. Would his place become vacant on his moving, or would he have to resign?"

In answer to the above request you are advised that, in my opinion, the member of the City Board of Education here considered automatically vacated his membership on the Board by moving from Talladega, with the expressed intention not to return.

Section 191 of the School Code of 1927 reads as follows:

"191. **City Board of Education; How Constituted.**—The general administration and supervision of the public schools and educational interests of each City shall be vested in a City Board of Education, to be composed of five members who shall be residents of such City, and who shall not be members of the City Council or Commission. The members of such City Board of Education who shall serve without compensation, shall be chosen solely because of their character and fitness, but no person shall be appointed or elected to this Board under the provision of this Section who is in any way subject to the authority of the Board."

It will be noted from the above quoted section of the School Code, that a member of the City Board of Education shall be a resident of the city upon his appointment to the City Board of Education. This office has heretofore ruled that one of the qualifications of a member of the City Board of Education is actual residence in the city from which he is appointed. **Biennial Report of Attorney General, 1932-34, page 216.**

Your attention is called to Section 2697 of the Code of 1923 which reads in pertinent part as follows:

"How offices are vacated—Any office in this state is vacated— * * *

(3) By (the incumbent) ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed."

The Supreme Court, in construing said section in the case of **Barker v. Conway,** 214 Ala. 366, 108 So. 18, stated as follows:

"Unquestionably, we think, our statute requires an actual residence by the holders of public office within the political subdivision for which they are appointed or elected, and which it is their duty to serve * * * We do not mean to hold that any temporary absence by a public officer would have that effect. Each case must be decided on its own facts, with a due regard for the elements of intention and actual absence."

In view of the above, it is my opinion, that if the member of the City Board of Education has actually changed his residence from the City of Talladega, and does not intend to continue his residence in the city, by so doing he has automatically vacated his membership on the City Board of Education, and it will not be necessary for such member to resign his office.

The conclusion here reached is predicated on the facts set out in your letter of inquiry, wherein it is stated that the party in question is not temporarily absent from the City but has indicated, that he does not expect to return.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1940.

Hon. H. B. Hamner,
County Supt. of Education,
Russell County,
Phenix City, Alabama.

Schools—School Districts—Teachers' Physical Examinations—

There is no authority of law for a county board of education to pay for a physical examination of teachers employed by such board.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated October 10, 1940, follows:

"May a County Board of Education legally spend school funds to help pay the expense of a physical examination of teachers employed by the Board, the said examination to be given by the County Health Officer? The only expense of the Board for such an examination would be for x-ray pictures which could not be made by the Health Officer."

My answer to your inquiry is in the negative.

An administrative board, created by statute and charged with the duty of devoting and expending public funds to the ends prescribed by law, can make only such disbursements as are expressly or impliedly authorized by law. The Supreme Court of this State in the case of **Woodruff vs. Beeland,** 220 Ala. 562, 127 So. 235, in speaking to this well-known principle of law, said:

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred."

I find no statute which expressly or impliedly authorizes a county board of education to expend the funds entrusted to it for the purpose of defraying the expenses of a physical examination of teachers employed by such board.

Sections 619-625 of the School Code of 1927, with reference to the medical and physical examination of school children, are not applicable to teachers either by direction or implication.

You are therefore advised that the county board of education may not legally expend school funds for the purpose outlined in your inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 18, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Costs—Appeals—Trial Tax—Library Tax—Circuit Clerks—

Trial Tax attaches when case filed and docketed in Circuit Court. General Acts, 1927, p. 261.

Library Tax attaches as item of costs when case filed in or brought by appeal or certiorari to circuit court. Local Acts, 1935, p. 218, Sections 18 and 20.

Costs—Appeals to circuit court from Intermediate Civil Court of Birmingham—When defendant is successful on appeal and plaintiff proves insolvent, execution may not issue against defendant for costs. Not liable for trial tax or library tax when successful on appeal.

Clerks of circuit courts who are on salary must not deduct 5% commission from trial tax collected after October 1, 1935. Collections made prior to that date are subject to commissions, which commissions should go into county treasury.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of March 19, 1940, in which you request my opinion as follows:

"In the Circuit Clerk's Office—Civil Division, a number of cases were disposed of between March 1, 1938 and November 30, 1939. These cases originated in the Inferior Court, where judgments were rendered against

the defendants. The defendants appealed to the Circuit Court and judgments were reversed.

"1. Would not a Trial Tax and Library Tax accrue in such cases when placed upon the Docket of the Circuit Court—Civil Division, since none had accrued in the lower Court?

"2. Please render your opinion relative to commission which Clerks and Registers are entitled to on Trial Tax between the period July 22, 1931, and July 10, 1935, where these officials are paid on a salary basis. Also if these officials are still entitled to the 5% on cases filed in the above period.

"For your further information we enclose herewith letter as received from E. C. Frazier, Jr., Assistant Examiner of Accounts.

"I have several officials here who contend that they were now entitled to the commission on Trial Tax in all cases which were disposed of subsequent to July 10, 1935, if they were docketed between July 22, 1931 and July 10, 1935, the date the amendatory Act was approved by the Governor."

The letter to which you refer from Assistant Examiner of Accounts, E. C. Frazier, Jr., reads in pertinent part as follows:

"While making the examination of the Circuit Clerk's office in the Civil Division I observed a number of cases which were disposed of between March 1, 1938 and November 30, 1939 where the Birmingham Electric Company had been the defendant in suits which were filed in the Inferior Court and on having judgment rendered against them in the before named Inferior Court the defendant appealed from the judgment so taken to the Circuit Court. In a number of these cases it was found that the Circuit Court had reversed the judgment of the lower court and found in favor of the Birmingham Electric Company. Their lawyer is contending that inasmuch as these cases were brought into the Circuit Court by them and successfully prosecuted in the Circuit Court that the Birmingham Electric Company would not be subject to pay the Trial Tax and the Library Tax which accrued in these cases. We have contended that even though the defendant in the lower court appealed to the higher court and won his cause it was at his instance that the case was brought into the Circuit Court where a Trial Tax and Library Tax accrued. It will also be noted that no Trial Tax or Library Tax accrued in the lower court at the time these appeals were taken. We are, therefore, insisting on the collection of both the Trial Tax and Library Tax that has accrued in these cases and would like to have you consider this and advise.

"Another question which has come to my attention and which I hope can be settled by an Attorney General's opinion is the matter relative to the commission which the several clerks and registers of Jefferson County are due on Trial Tax in cases which were filed between the period from July 22, 1931 and July 10, 1935, or in counties where these officials are paid on a salary basis. I understand, that all officials whether on a salary or fee basis in the above mentioned period were entitled to a five per cent commission on all Trial Tax remitted within this period and in

counties where the officials were on a salary basis this commission was collected and remitted to the County Treasurer of such County but I am doubtful as to whether or not they are still entitled to commission on cases that were filed in this period. By reference to House Bill No. 324, Harrison Act, Page 263, Section 9, of the 1935 General Acts, it will be noted that the Legislature attempted to repeal the law relating to the commission on Trial Tax in Counties where officials are paid on a salary basis. However, I have had several officials here to contend that they were still entitled to the commission on Trial Tax in all cases which were disposed of subsequent to July 10, 1935, the date that the amendatory Act was approved by the Governor, if they were docketed between July 22, 1931 and July 10, 1935."

I am of the opinion that your first inquiry should be answered in the affirmative.

Your attention is called to Section 9 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, p. 256, at page 263), which provides in pertinent part as follows:

"A trial tax of three dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending **and which hereafter goes upon the docket of any circuit court in this State to be taxed and collected as other costs.** * * * " (Emphasis supplied)

Act No. 259, H. 691, approved August 11, 1927 (General Acts, 1927, p. 261), provides in pertinent part as follows:

" * * * That in all civil (including equity) cases hereafter filed in or brought by appeal or certiorari to the Circuit Court, of Counties of two hundred thousand or more inhabitants there shall be taxed as costs, the sum of one dollar in each case to be collected as other costs are collected, and to be paid to the Clerk of such Circuit Court. That said sum of one dollar shall be called the Library Tax."

This act has been superseded by Act No. 462, H. 833, approved September 15, 1939 (Local Acts, 1939, p. 277). However, the provisions of the later act are identical in legal effect with the provisions of the earlier act in all respects here material.

I am of the opinion that as soon as a case is placed on the docket of the circuit court the trial tax and library tax attach and should be collected. Quarterly Report of Attorney General, Vol. XVI, p. 197; Biennial Report of Attorney General, 1934-36, p. 67. The opinion appearing in Biennial Report of Attorney General, 1928-30, p. 508, which arrives at the opposite conclusion, is, in my opinion, laid in error; and the same is, to that extent, overruled and withdrawn.

In connection with your first inquiry, the letter to you from Assistant Examiner of Accounts, E. C. Frazier, Jr., above set out in part, presents the further question as to whether the defendant in the Inferior Court in question, who was the losing party therein, but successful in the circuit court on

appeal, would be liable for said trial tax and library tax in cases where the losing party proved insolvent. In my judgment, this inquiry should be answered in the negative.

Sections 18 and 20 of Act No. 363, H. 788, approved September 7, 1935 (Local Acts, 1935, p. 219), creating the Intermediate Civil Court of Birmingham, provide:

> "Section 18. That all cases in said court shall be tried by the judge of said court without the intervention of a jury, the judge determining both the law and facts and any party shall have the right to appeal to the Circuit Court within five days from entry of judgment and on appeal either party may demand a trial by jury under the same rules as are provided by law for demand of jury trials in cases of appeal from judgments of justice of the peace and the trial in said Circuit Court shall be de novo and according to the same procedure as apply to appeals from judgments of justices of the peace."

> "Section 20. That any party desiring to appeal shall give bond with sureties to be approved by the clerk conditioned to pay all costs which may be taxed against him in the Circuit Court."

Section 7805 of the Code of Alabama, 1923, provides:

> "When against plaintiff for his costs.—When execution against the defendant is returned 'no property found' execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

Section 8788 of the Code of Alabama, 1923, relative to appeals from justice of the peace courts provides:

> "Costs; how taxed.—If the defendant appeals or obtains a writ of certiorari, and the judgment of the appellate court is for less than the judgment of the justice, the court may tax either party with the costs, or with any portion thereof; and if the plaintiff appeals, or obtains a writ of certiorari, and does not recover more than the amount for which the justice rendered judgment, he must be taxed with the costs."

Statutes relating to costs are penal in their nature and are strictly construed. 15 C. J. 24; **Morrow v. Rosenthil,** 106 Ala. 198, 17 So. 608; **Dawson v. Mathews,** 105 Ala. 485, 17 So. 19; Code of Alabama, 1923, Sections 3734, 7255.

Statutes relating to costs on appeal from a justice's court are mandatory in their character and no party other than the one designated by law to pay court costs can be required to do so. 15 C. J. 290.

The Supreme Court of Alabama has ruled that a suit instituted before a justice of the peace and reversed by appeal to the circuit court or county court, is to be regarded as a case at law and the unsuccessful party must be charged with all costs by the appellate court, unless the case comes within the Act of 1824 (now Section 8788 of the Code of 1923), which provides that

where a defendant appeals and recovers less than the judgment of the justice, the appellate court may in its discretion give judgment against either party for the costs; or where a successful plaintiff appeals and recovers no more than was adjudged by the justice, he shall pay all costs. **Beason v. Riddle,** 11 Ala. 743.

It will be noted that the trial in the circuit court from an appeal from Intermediate Civil Court shall be **de novo** and according to the same procedure as applies to an appeal from the judgment of the justices of the peace. This means that when the case is docketed in the circuit court it is not designated as an appellant and appellee but as plaintiff and defendant; and the Birmingham Electric Company would be designated the party defendant.

Under the provisions of Section 20 Act No. 363, supra, the party desiring the appeal must pay all costs which may be taxed against him in the circuit court. This office has ruled that where a suit is brought against a defendant for damages and the verdict is for the defendant, execution cannot be issued against the defendant for any portion of the costs. Quarterly Report of Attorney General, Vol. III, p. 92; **Pritchard, et al v. Fowler, et al.,** 146 Ala. 187, 40 So. 954. Following this ruling, I am of the opinion that a suit instituted before the Intermediate Civil Court of Birmingham in which on trial de novo judgment is rendered in favor of the defendant, in the circuit court, the unsuccessful party must be charged with all the costs in the circuit court and execution cannot be issued against the defendant, who prosecuted the appeal, for any portion of the cost.

The trial tax and library tax are not, strictly speaking, court costs. They amount to a tax on litigation. Quarterly Report of Attorney General, Vol. XVII, p. 40; **State v. Montevallo Coal Mining Co.,** (Ms). However, they are collected under the same conditions as items of court costs are collected. It follows that if a judgment is rendered in favor of the defendant on his appeal to the circuit court from a judgment of an inferior court, the defendant is not liable for the library tax nor the trial tax. Cf. **State v. Nance,** 69 Tenn. (1 Lea) 644.

In answer to your second inquiry, it is my judgment that clerks and registers paid on a salary basis should deduct the 5% commissions or trial taxes **collected and remitted** from July 22, 1931, and October 1, 1935, which commissions are paid into the county treasury. However, if said trial taxes were not collected and remitted until after October 1, 1935, no commissions are due, regardless of when the case was docketed. Cf. Quarterly Report of Attorney General, Vol. XVII, p. 386.

Sections 1 and 2 of Act No. 491, approved July 22, 1931 (General Acts, 1931, p. 604), provide:

> "Section 1. That a trial tax of Three Dollars be, and the same hereby is, imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: one-half thereof into the general funds of the State Treasury, and the other half into the general funds of the County in which the same is collected and for col-

lecting and remitting such tax, the clerk or register may retain 5% commission thereof.

"Section 2. That in all counties in this State where the clerk or register is paid a salary out of the County Treasury that the 5% commission provided for by Section One (1) of this Act shall be collected and retained by such clerk or register and paid into the County Treasury."

Sections 9 and 407 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, p. 256), provide in pertinent part as follows:

"Section 9. * * * In all counties in this State where the clerk or register is paid on a salary basis under constitutional authority, the five per cent (5%) commission provided for by this Act shall not be collected, but such clerk or register shall pay to the State and county respectively, each one-half of such trial tax. * * * "

"Section 407. Except as otherwise provided in this Act, all the provisions of this Act shall go into effect on the first day of October, 1935."

It will be noted that the commission provided for in Act No. 491, supra, is for **collecting and remitting,** and if not collected and remitted before October 1, 1935, no commissions should be deducted. Quarterly Report of Attorney General, Vol. XX, p. 334.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 18, 1940.

Hon. Edward B. Brosland, Chief,
Division of Local Finance,
Department of Finance,
State Capitol.

Department of Finance—Municipal Corporations—

1. Reports of examinations and audits of records and accounts of municipal corporations, made by Department of Finance, not required to be addressed to any particular officer or officers.

2. Chief of Division of Department of Finance who supervises the making of such examinations and audits vested with authority to direct that such reports be addressed to the chief executive officer of the municipal corporation whose records and accounts are examined.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Receipt is acknowledged of your letter of October 15, 1940, which is as follows:

"As you know, the Department of Examiners of Accounts and the Division of Departmental and County Audits in the office of the State Comptroller were abolished and all of the powers, functions and duties of said Department and Division, with certain exceptions not here material, were transferred to and conferred upon the Department of Finance by Section 7 of the Department of Finance Act of 1939. These powers, functions and duties are now exercised by the Division of Examiners of Public Accounts of the Department of Finance, under the direction of the Chief Examiner of Public Accounts, which Division was created by the Director of Finance pursuant to Section 26 of said Department of Finance Act of 1939.

"There was also created by Section 25 of said Act, the Division of Local Finance of the Department of Finance, which Division is under the direction of the Chief of the Division of Local Finance

"Section 5, Subsection 16, Department of Finance Act of 1939, provides as follows:

" 'Section 5. Functions and Duties of the Department of Finance. The general functions and duties of the Department of Finance shall be as follows: * * * (16) If and when requested by any municipal corporation, political subdivision or other local public body, and if and when it shall have employees available for such purpose, to examine and audit the records and accounts of such municipal corporation, political subdivision or other local public body and the officers thereof.'

"At the present time, the Department of Finance is engaged in making examinations and audits of the records and accounts of certain municipalities in the State of Alabama, who have requested that such examinations and audits be made. This work is being done, under my supervision, by assistant examiners of public accounts, who are regularly employed in the Division of Examiners of Public Accounts. These assistant examiners of public accounts have been assigned indefinitely to the Division of Local Finance by the Director of Finance to perform this and other necessary work.

"The question has arisen as to whom the reports of such examinations and audits should be addressed. Therefore, I respectfully request your opinion as to whether or not there is any provision of our statutory law that requires the reports of such particular examinations and audits to be addressed to any particular officer or officers?

"If there is no provision in our statutes requiring the reports of these examinations and audits to be addressed to any particular officer or officers, am I, as Chief of the Division of Local Finance, vested with authority

to direct that such reports be addressed to the chief executive officer of the municipality whose records and accounts are examined and audited, with copies thereof to be furnished to such officers of the State of Alabama as I see fit?"

As I understand it, the Director of Finance, pursuant to the authority vested in him by Section 26 of the Department of Finance Act of 1939, Act No. 112, H. 72, approved March 7, 1939, General Acts, 1939, page 144, has assigned to you, as Chief of the Division of Local Finance, the duty of supervising examinations and audits of the records and accounts of municipal corporations, which said examinations and audits are made by the Department of Finance under Sub-section 16 of Section 5 of said Act, which is set out in your letter of inquiry.

The only provision of the statutory law of this State of which I am aware in regard to that subject of to whom reports of examinations and audits made by assistant examiners of public accounts should be addressed is Section 746 of the Code of Alabama, 1923, which reads as follows:

"746. Reports of examiners to department.—The examiners shall make sworn reports in triplicate, of their findings in state matters to the department within ten days after the completion of the work assigned, and triplicate reports on county work, two to the department, and the other to the judge of the circuit court or court having like jurisdiction, who shall in his oral charge call the attention of the grand jury thereto and have the same entered in full upon the minutes of the court. Such reports shall be public records and shall be prima facie evidence of what they charge."

However, it is to be noted that this Section only applies to reports of examinations and audits of the records and accounts of State and county affairs, and that it does not apply to the reports of examinations and audits of the records and accounts of municipal corporations. As a matter of fact, prior to the passage of the Department of Finance Act of 1939, no office or department of the State of Alabama had any authority whatever to examine and audit the records and accounts of municipal corporations; and the provisions of the Department of Finance Act of 1939, vesting the Department of Finance with such authority, which are set out in your letter of inquiry, do not provide that such examinations and audits be made in the same manner provided by law for the making of examinations and audits of the records and accounts of State and county affairs. Consequently, I am of the opinion that Section 746, supra, has no application to the reports of examination and audits of the records and accounts of municipal corporations. Nor am I aware of any provision of the statutory law of this State that requires that such reports be addressed to any particular officer or officers.

This being true, and since the Director of Finance has placed upon you, as the Chief of the Division of Local Finance, the duty of supervising such examinations and audits, I am of the opinion that you have the authority to direct that the reports of such examinations and audits be addressed to the chief executive officer of the municipal corporation whose records and accounts are being examined and audited, with copies thereof to such officers of the State of Alabama as you see fit.

Yours very truly,
THOMAS S. LAWSON,
Attorney General.

October 21, 1940.

Hon. L. W. Jordan,
Superintendent of Education,
Jackson County,
Scottsboro, Alabama.

Schools—Sixteenth Section Lands—

1. County board of education cannot pay attorney's fee from proceeds received from condemnation of sixteenth section lands for representing said board in said condemnation proceeding.

2. Proceeds received from condemnation of sixteenth section lands cannot be used by county board of education to construct school buildings within the township in which said section is located, but must be used according to constitutional mandate.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 10, 1940, in which you request my opinion as follows:

"I am herewith enclosing a copy of the final decree of the District Court of the United States for the Northern District of Alabama, Northeastern Division, in the case of **United States of America v. State of Alabama, et als.** Upon an examination of this decree, you will find that it is an order of condemnation of certain Sixteenth Section lands lying in Jackson County, Alabama.

"The County Board of Education of Jackson County found it necessary, in order to protect the interests of the schools, to employ counsel to represent it. This attorney has presented to the Board a bill for his services, in the amount of $500. I would like to request your opinion as to whether or not the County Board of Education may legally pay this attorney for his services out of the proceeds derived from the condemnation of this Sixteenth Section land.

"I further request your opinion as to what disposition should be made of this money. I would like your specific answer to the question as to whether or not this money may be expended by the Board of Education of Jackson County in the construction of school buildings within the township in which this section is located."

I am of the opinion that your first inquiry and the specific part of your second inquiry should be answered in the negative.

Under the Act of Congress of March 2, 1819 (3 Stat. 489) by which sixteenth sections are granted in perpetuity to the inhabitants of the several townships, the legal title is in the State in trust for the respective townships

in which the lands are located. **Long v. Brown,** 4 Ala. 622. Since the inhabitants of a township were not incorporated, the title to sixteenth section lands could not vest in them, but vested in the State for their use and benefit. **State v. Board of School Commissioners of Mobile County,** 183 Ala. 554, 63 So. 76. See also **State v. Schmidt,** 180 Ala. 374, 61 So. 293, 232 U. S. 168, 34 S. Ct. 301; **State c. Inman,** (Ala. Sup. Ct.) 195 So. 448. It will be seen from the above that the State holds sixteenth section lands in trust for the inhabitants of the township in which said section is located.

I am of the opinion that the specific part of your second inquiry should be answered in the negative.

Sections 257 and 260 of the Constitution provide as follows:

"257. The principal of all funds arising from the sale or other disposition of lands or other property, which has been or may hereafter be granted or entrusted to this state or given by the United States for educational purposes shall be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific object of the original grants or appropriations."

"260. The income arising from the sixteenth section trust fund, the surplus revenue fund, until it is called for by the United States government, and the funds enumerated in sections 257 and 258 of this constitution, together with a special annual tax of thirty cents on each one hundred dollars of taxable property in this state, which the legislature shall levy, shall be applied to the support and maintenance of the public schools, and it shall be the duty of the legislature to increase the public school fund from time to time as the necessity therefor and the condition of the treasury and the resources of the state may justify; provided, that nothing herein contained shall be so construed as to authorize the legislature to levy in any one year a greater rate of state taxation for all purposes, including schools, than sixty-five cents on each one hundred dollars' worth of taxable property; and provided further, that nothing herein contained shall prevent the legislature from first providing for the payment of the bonded indebtedness of the state and interest thereon out of all the revenue of the state."

Under these constitutional provisions a trust fund is created and the proceeds thereof must be used in the manner therein provided. Said constitutional provisions operate to impress a trust upon all funds arising from sixteenth section lands, by way of sale, lease or otherwise, in perpetuum, for the benefit of the township in which the lands are located. See **In re Opinions of the Justices,** 215 Ala. 524, 111 So. 312; **In re Opinions of the Justices,** 229 Ala. 98, 155 So. 699; **Turnipseed, et al. v. Blan,** 226 Ala. 549, 148 So. 116. In the case of **Hall v. Blan,** 227 Ala. 64, 148 So. 601, it is said:

"As for funds devoted by the Constitution to specific purposes, no legislative act could make it lawful to commingle such funds with others, resulting in diverting any part of same to other purposes, however lawful, as regards funds from which they may be paid. The Constitution governs both the legislative and executive officers."

All of the proceeds derived from the condemnation of sixteenth section lands should be paid over to the Department of Conservation to be applied by it in accordance with the mandates of the constitutional provisions above set out. Act No. 581, H. 851, approved September 22, 1939 (General Acts, 1939, page 949, Pamphlet), commits to the Director of Conservation complete management of, and supervision over, lands known as school lands, as defined by Section 629 of the Alabama School Code of 1927, which includes sixteenth section lands. The effect of this act is to constitute the Director of Conservation trustee of these school lands to be managed and supervised by him in his capacity of trustee, and does not undertake to empower him to use the proceeds of the sale, or the income, of such lands otherwise than as provided by the Constitution or the terms of the original grants themselves, and is therefore not in any sense offensive to the Constitution. Said act merely transfers from the Department of Education to the Department of Conservation the duty of administering and supervising the sixteenth section lands in this State. **Quarterly Report of the Attorney General, Vol. XVIII, page 204.**

The premises considered, it follows that none of the proceeds in question can be used to pay an attorney's fee and that such proceeds must be remitted in toto to the Department of Conservation.

I wish to call your attention to that part of the General Appropriations Act of 1939 (Act No. 247, S. 239, approved March 24, 1939, General Acts, 1939, p. 411), which provides as follows:

> "VIII. DEVELOPMENT AND CONSERVATION OF NATURAL RESOURCES: 1. Department of Conservation * * * For surveying, investigation, marking, supervising, patroling, and protecting 16th section lands, school indemnity lands, and lands belonging to the institutions of the State $10,000, * * * "

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1940.

Mrs. Edwina Mitchell, Associate Member,
State Board of Pardons and Paroles,
Montgomery, Alabama.

Pardons and Paroles—

Upon the revocation of a parole, the time due by the prisoner is calculated from the date of the declaration of the delinquency by the State Board of Pardons and Paroles, rather than from the date of the act of the prisoner upon which said declaration of delinquency is predicated.

After the expiration of the maximum sentence without declaration of delinquency by Board of Pardons and Paroles, the Board loses jurisdiction and control of the prisoner, notwithstanding that some

act of delinquency was committed by him prior to said expiration, for which the Board legally might have revoked his parole.

Prior to expiration of maximum sentence, Board is without authority to restore prisoner's citizenship and other civil and political rights, without granting pardon.

After expiration of term of maximum sentence, Board may restore ex-prisoner's citizenship and other civil and political rights upon application made therefor, without the formality of granting pardon.

Opinion by Assistant Attorney General Rowe.

Dear Mrs. Mitchell:

I have your letter of September 26, 1940, in which you request my opinion as follows:

"Several propositions have been raised recently in our administration of Act No. 275, S. 186, approved August 25, 1939, General Acts, 1939, page 426, the Act creating the State Board of Pardons and Paroles, we will thank you for an early opinion regarding the proper application of the law to the following questions.

"1. Upon revocation of a parole, is the time due by the subject calculated from the date of the declaration of delinquency (see Section 12) or from the date of the actual delinquency?

"2. Can a parole be revoked by this Board after the expiration of the maximum sentence if the actual delinquency occurred prior to the expiration of the maximum sentence, where the determination of delinquency by the Board occurred after the expiration of the maximum sentence?

"3. What is the meaning of the term "pardoned" as used in Section 13 of the Act above referred to?

"4. May the Board order restoration of citizenship and relieve from civil and political disabilities before granting a pardon? If your answer to this inquiry is in the affirmative, what will be the effect of such an order upon the control which the Board may exercise over a party released under parole if such relief from civil and political disabilities has been granted?"

The Court of Appeals of Alabama, in the case of **Daniel Pinkerton v. State**, 6th Div. 663, on rehearing (in manuscript), handed down on the 6th day of August, 1940, in which the Supreme Court of Alabama denied certiorari in the case of **Ex parte State** (In re Daniel Pinkerton v. State), (memorandum opinion, now in manuscript) handed down on the 10th day of October, 1940, has answered both your inquiries one and two.

As to the question posed in your inquiry numbered one, the court said:

> "Such a conclusion is not only harmonious to decisions construing similar acts in other jurisdictions, but, likewise, is wholly consistent with Section 12 of the Alabama Act, where it is provided that the Board, for cause, may 'declare such prisoner delinquent and time owed shall date from such delinquency.' Under its provisions the Board may, **after this declaration of delinquency, require such prisoner to serve such time as is then unexecuted,** ('or such part thereof as it may determine'), of course, allowing the prisoner as credit, on the remaining part due to be executed, the time already served, whether outside or inside of prison, **to be 'calculated from the date of delinquency.'"** (Emphasis supplied).

The above quoted excerpt is direct authority for the conclusion that the time due by the prisoner dates from the declaration of delinquency made by the Board, as provided by Section 12, and not from the date of the act of delinquency.

In the case, supra, the Court further said:

> "In this cause the appellant was declared delinquent by the Board on February 13, 1940. Subsequent to said date and since the Act under discussion became effective, he had already endured the maximum sentence imposed upon him. The Board, at that time, had, therefore, lost control or jurisdiction of the prisoner and he then stood discharged by operation of law."

The above quoted excerpt is direct authority for the conclusion that after the expiration of the maximum sentence the Board loses control or jurisdiction of the prisoner and he stands discharged by opeartion of law, notwithstanding the fact that prior to the expiration of the maximum sentence he did some act for which he **might** have been declared delinquent, but because of which act no declaration of delinquency was made by the Board until after the expiration of his maximum sentence.

Answering your third inquiry, the word "pardon", as it appears in Act No. 275, S. 186, approved August 25, 1939, (General Acts, 1939, page 426), must be given its usually accepted meaning. In **Ex parte Powell,** 73 Ala. 517, the Supreme Court defined "pardon" in the following language.

> "A pardon, alike under both systems of government, has always been considered a mere act of grace, or governmental forgiveness of an offense, by which the penalty of crime is legally remitted.—2 Abb. L. Dict., title, Pardon."

In my opinion, that definition of "pardon" is applicable to the term as used in Section 13 of Act No. 275, supra.

Your fourth question involves two situations, viz., (a) may the Board order restoration of citizenship or other civil and political rights prior to the expiration of the maximum term for which the prisoner was sentenced, without granting pardon? and (b) may the Board, after the prisoner has been discharged by operation of law by the intervention of the expiration of the

maximum term for which he was sentenced, restore citizenship and other civil and political rights of the convict without going through the formality of granting him a pardon?

In my opinion, subdivision (a), supra, must be answered in the negative. Section 182 of the Constitution, insofar as here pertinent provides:

"182. The following persons shall be disqualified both from registering, and from voting namely:

" * * * those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining money or property under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crimes involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

Simultaneously with the ordination of the above quoted section, the people ordained Section 124 of the Constitution which, insofar as here pertinent, provided:

" * * * Pardons in cases of felony and other offenses involving moral turpitude shall not relieve from civil and political disabilities, unless approved by the board of pardons and specifically expressed in the pardon."

The amendment to Section 124 of the Constitution proposed by Act No. 8, S. 4, passed by the Senate and the House of Representatives March 29, 1939 (General Laws, Special Session, 1939, page 8), and subsequently adopted by the people, insofar as here pertinent, provides:

"124. * * * No pardon shall relieve from civil and political disabilities unless specifically expressed in the pardon."

Section 365 of the Code provides:

"365. Pardon restores citizenship and right to vote.—Any person who is disqualified from voting by reason of conviction of any of the offenses mentioned in section 364 (293) of this code, except treason, whether the conviction was had in a state or federal court, and who has been pardoned, may be restored to his or her citizenship with right to vote by the governor, approved by the board of pardons and specially expressed in the pardon."

Consideration of these constitutional and statutory provisions excludes the idea that it was the intention, either in the Constitution or in the statute, that civil and political rights might be restored to a person convicted of an offense which had the effect of forfeiting his civil and political rights, before the prisoner had served his maximum sentence, without the intervention of a pardon. Cf. Opinions of the Attorney General, Office Edition, Volume IX, p. 30 (1932).

So that, subdivision (a) of your fourth inquiry, supra, must be answered in the negative.

Before the adoption of the amendment to Section 124 of the Constitution, supra, and the enactment of the enabling legislation, supra, creating the Board of Pardons and Paroles, the time during which a prisoner was released on parole was not taken into consideration in the computation of his maximum sentence. **Fuller v. State,** 122 Ala. 32, 26 So. 146. Therefore, under the law then obtaining, a person who was convicted of crime and who was paroled prior to the expiration of his sentence, was required to obtain a pardon from the State Board of Pardons, then in existence, in order to be discharged from any further accountability on account of his crime. **Fuller's case,** supra.

However, under the new law relating to pardons and paroles, the time during which a prisoner is on parole is taken into consideration in computing his maximum sentence, and at the expiration of said maximum sentence, whether parole intervenes or not, the prisoner stands discharged by operation of law.

That discharge does not, ipso facto, restore his citizenship or other civil and political rights. It is still necessary for him to apply for the restoration of his citizenship and other political and civil rights. Act No. 275, supra, in Section 17 thereof, vests in the Board authority in the premises. It provides:

> "Section 17. Said Board may adopt and promulgate rules and regulations not inconsistent with the provisions of this act touching upon all matters herein dealt with, including among others, practice and procedure in matters pertaining to paroles, pardons and remission of fines and forfeitures. * * *"

Therefore, it is my opinion that the question posed in subdivision (b) of your inquiry numbered four must be answered in the affirmative, that is to say, that after the expiration of the maximum sentence for which a convict has been sentenced, the Board of Pardons and Paroles may entertain an application for restoration of citizenship and other civil and political rights without the formality of granting to the applicant a pardon. Cf. Opinions of the Attorney General, Office Edition, Volume IX, p. 30 (1932), supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 22, 1940.

Hon. Madison L. Smith,
Tax Assessor, and
Hon. J. H. Blount,
Tax Collector,
Washington County,
Chatom, Alabama.

Woods and Forests — Taxation for Forest Protection — Statutes— Constitutional Law—

Act No. 562, H. 620, approved September 21, 1939 (General Acts, 1939, page 884) is unconstitutional for the reason that it violates Section 23 of the Alabama Constitution.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for official opinion as follows:

"Please refer to Act No. 562, Acts of 1939, pages 884-885; Acts Nos. 325 and 326, Acts of 1939, pages 466-468; and to 1901 Constitution of Alabama, Sections 214-215; and let us have your official opinion at your earliest convenience, on the following questions:

"1. Is Act No. 562, Acts of 1939, violative of either Section 214 or 215 of the Constitution of Alabama?

"2. In Counties where said Act No. 562, Acts of 1939, has been complied with as to petition and levy by the Court of County Commissioners, is it the duty of the Assessor and Collector to levy and collect taxes as provided by said Act?

"3. In case a taxpayer fails or refuses to assess or pay such taxes, what is the machinery for enforcement of collection?

"4. Would the Assessor and Collector each be entitled to 2% commissions for Assessing and Collecting such taxes.

"It would be appreciated if you will let us have your official opinion at your earliest possibility, as we are now confronted with the questions stated above."

As I understand your request for opinion, you are interested in being advised as to whether or not Act No. 562, H. 620, approved September 21, 1939 (General Acts 1939, page 884) is invalid for the reason that it runs afoul of any provision of the Constitution of Alabama. Your request specifically refers to Sections 214 and 215 of the Constitution, but, because of the fact

that patently the Act, supra, is violative of Section 23 of the Alabama Constitution, I pretermit discussion of any constitutional question save that relating to Section 23.

The pertinent provisions of said Act are:

"Section 2. That for the purpose of receiving the financial and supervisory cooperation of the Division of Forestry of the Department of Conservation of the State of Alabama in forest protection, the county governing body is required to make, assess and levy a special annual tax upon all said lands in the county, **or any definitely described portion thereof,** immediately upon receipt of a petition, so requesting, signed by a majority of the freeholders of the county, **or definitely described portion thereof, said area to be known as a forest protection area."**

"Section 3. That said tax shall remain the same from year to year, except that it may be changed or discontinued upon receipt of a petition, so requesting, signed by a majority of the freeholders of the county, or definitely described portion thereof, involved; or by the Division of Forestry of the Department of Conservation of the State of Alabama."

"Section 4. That the tax so assessed shall be collected as other taxes are collected and remitted to the State Treasurer and placed in a 'Forest Protection Fund' **to be expended by the Division of Forestry of the Department of Conservation of the State of Alabama for forest fire protection in the county, or definitely described portion thereof against which the tax has been assessed."**

"Section 5. The Division of Forestry of the Department of Conservation is hereby empowered and directed to establish and designate **such forest protection areas** prior to the submission of the petition provided for in Section 2 of this act."

"Section 6. That by forest land, as used in this Act, is meant any land which supports a forest growth, or which under prevailing natural and economic conditions may be expected to support such a growth in the future, or which is being used or reserved for any forest purpose."

"Section 7. The Division of Forestry of the Department of Conservation is hereby empowered and directed to furnish to the county governing body in which it is proposed **to establish a forest protection area, a list of the land owners within said proposed forest protection area,** said list to show **the total amount of forest land owned by each landowner subject to the forest protection tax within said forest protection area."**

"Section 8. The tax provided for in Section 1 of this Act shall not be assessed and levied until such time as the County Board of Equalization shall have first inspected and reviewed such property and shall have designated the same forest land and such lands must have been returned to or listed with the tax assessor of the county where located as forest land, and have been placed on the tax rolls for ad valorem taxation as other forest land." (Emphasis supplied)

The General scheme of the Act is not to authorize the levy of a tax on all the taxable property in the county for general county purposes, nor even to authorize such a levy in any designated "forest protection area" within the county. It contemplates that a tax for forest protection purposes within the designated area may be levied only on the lands within the county, or within the designated and established "forest protection area" therein, which support forest growth, or which under prevailing natural and economic conditions may be expected to support such growth in the future, or which are being used or preserved for any forest purpose.

The effect of the Act is to authorize the creation of associations of persons owning such land and to authorize the imposition of a tax or forced subscription on the forest lands owned by them for the benefit of such associations of persons.

The pertinent part of Section 23 of the Constitution provides:

> " * * * and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."

Comparable legislation has been held unconstitutional as violative of Section 23, supra, by the Alabama Supreme Court in the cases of **Bradley et al v. State ex Rel Rockwell,** 210 Ala. 166, 97 So. 543; **Collins, Judge et al v. Hollis,** 212 Ala. 294, 102 So. 379, and **Robertson v. Collins, Judge et al,** 218 Ala. 54, 117 So. 415.

On the basis of these authorities, I am constrained to advise you that Act No. 562, supra, is unconstitutional and void for the reason that it runs afoul of Section 23 of the Alabama Constitution.

In arriving at this conclusion, I have considered cases from other jurisdictions which uphold similar legislation, particularly, **Sandy River Plantation v. Lewis,** 109 Me. 472, 84 A. 995; **State ex Rel Sherman, State Treasurer v. Pape, State Forester and Fire Warden,** 103 Wash. 319, 174 P. 468; **First State Bank of Sutherlin v. Kendall Lumber Corporation, et al,** 107 Or. 1, 213 P. 142; and **Chambers v. McCollum,** 47 Idaho 74, 272 P. 707. However, the constitutional provisions of the several states there dealt with are different from the quoted excerpt from Section 23 of the Alabama Constitution.

In view of my conclusion, supra, answers to the other questions posed in your inquiry are unnecessary.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 22, 1940.

Hon. A. J. Hawkins, Director,
State Planning Commission,
2 North Perry Street,
Montgomery, Alabama.

Copyrights — Building Code —

Building Code prepared by consultant to State Planning Commission infringement upon the copyrighted code of the Pacific Coast Building Officials Conference.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated August 29, 1940, follows:

"Re: Building Code for Small Cities in Alabama.

"The Alabama State Planning Commission is attempting to develop a building code, in simplified and brief form, for use in small cities of Alabama.

"There are several codes available but most of them are rather technical and are difficult of interpretation by the average building inspectors available to small cities.

"Under the direction of Mr. Charles W. Killam, Consultant to the Alabama State Planning Commission, there has been developed a tentative form of building code which has been patterned in some respects to the Code of the National Board of Fire Underwriters, to certain parts and recommendations from the Bureau of Standards in Washington, and to the Uniform Building Code as prepared by the Pacific Coast Building Officials Conference of Los Angeles, California.

"The latter code has been copyrighted by the Pacific Coast Building Officials Conference and among their requirements for cities wishing to adopt their code either completely or in modified form, they require the cities to join the Conference at the cost of $25.00 per year for cities the size of Guntersville, Alabama.

"I write to obtain your opinion as to whether or not, under the circumstances, the code which we have prepared would infringe upon the copyright of the aforementioned Uniform Building Code.

"A statement from our Consultant is herewith quoted: 'The draft which I prepared does not copy the Uniform Code as a whole and it does not adopt any portion thereof any more than it does portions of many other codes. Many provisions of codes are identical, for instance provisions taken from Government recommendations or from the Code of the

National Board of Fire Underwriters. I have never heard of the copyright claim before as applied to a draft made up as mine was . . . . I do not believe that a legislative body can be prevented by copyright from any wording which it wants to use in a by-law, ordinance or statute.'

"The purpose of the Pacific Coast Conference in requiring membership of cities adopting the code is to help defray expenses in keeping the code revised and up to date and permitting such new materials and construction that may become available to the building trade from time to time. It is supposed to be a non-profit organization.

"If we were adopting their copyrighted code there would be little doubt in my mind. We do propose to adopt certain portions of their code which may or may not be their original statement. The material used by the authors of the Uniform Building Code might have come from the statements of the Bureau of Standards, various city building codes, the National Board of Fire Underwriters, and from many other sources. Portions of our code are taken from their copyrighted code.

"We have no objection to cities obtaining consent of the owners of the copyright but we do not care to recommend the adoption of a code which would cause the cities of Alabama to contribute $25.00 a year or more continuously and for an indefinite period of time. No doubt many of the cities are not able to pay the amount, and further, I do not feel that it would be a good policy on the part of the State to recommend a code which would form a continuous expense to the various cities."

It is my opinion, based upon the facts set forth in your letter, that your inquiry should be answered in the affirmative.

In 13 C. J. Section 307, page 1133 et seq. is found the following statements:

"**Compilations - (1) In General.** Perhaps the most difficult questions with regard to infringement arise where neither of the two works, one of which is claimed to be a piracy of the other, is strictly original, but where both are based on materials which are common property. The compiler of such a book does not, by copyrighting his book, acquire a monopoly of the subject of which the book treats; any other person may select the same subject and, going to the original or public sources of information, make a similar work. But the subsequent compiler must investigate for himself from the original sources which are open to all. He cannot use the labors of a previous compiler animo furandi and save his own time by copying the results of the previous compiler's work, although the same results could have been obtained by independent labor; he is bound to set about doing for himself that which the first compiler has done. It is piracy to copy from a compilation extracts and quotations or other matter which the compiler has selected and put into his book, notwithstanding the same matter may be found in common and public sources from which the second compiler, if possessed of sufficient skill, judgment, and industry, could have selected for himself; he has no right to copy his predecessor's selections, and thereby annex the skill, judgment, and taste which dictated the selections, or save himself the labor of reading or using the original sources and making his own selections therefrom."

"**Test of piracy.** It has been laid down as the clear result of the authorities in cases of this nature that the true test of piracy is to ascertain whether the author of the alleged piratical work has in fact used the plan, arrangement, and illustration of the copyrighted work as the model of his own work, with colorable alterations and variations only, to disguise the use thereof, or whether the work is the result of his own labor, skill, and use of common materials and common sources of knowledge open to all men, and whether the resemblances are either accidental or arising from the nature of the subject; in other words, whether defendant's work is quoad hoc a servile or evasive imitation of the copyrighted work, or a bona fide and original compilation from other common and independent sources. The question is always simply one of fact, whether defendant copied the matter from complainant's book or obtained it by his own skill and labor from the common source."

It will be noted that a compiler of a book, based on material which is common property, does not, by copyrighting the said book, acquire a monopoly of the subject so treated but his work and labor is protected against being copied by a subsequent compiler. The subsequent compiler must investigate for himself from the original sources which are open to all.

In the case of **Hartfield vs. Peterson et al,** 91 Fed. (2d) 998, the court, in considering a suit for infringement of a copyrighted cable and telegraph code, made the following statements:

"It must be borne in mind that the compilation is the sum total of the words and phrases as arranged by the author and that the copyright is valid because of the originality of the combination. When the statute allows a compilation to be copyrighted, it seems clear that no one can copy phrases or sequences which are original with the author or appropriate any other part of the copyrighted work, whether that part is in the public domain or not. As we said in Sheldon v. Metro-Goldwyn Pictures Corporation, 81 F. (2d) 49, 54:

> "'If the copyrighted work is therefore original, the public demesne is important only on the issue of infringement; that is, so far as it may break the force of the inference to be drawn from likenesses between the work and putative piracy. If the defendant has had access to other material which would have served him as well, his disclaimer becomes more plausible.'

* * *

"As we have already said, it does not make the slightest difference where Hartfield obtained his material, if defendant copied it. Hartfield published a code, parts of which were assembled and arranged by his labor, and obtained a valid copyright. If it were demonstrated that any portions which Peterson copied were taken by Hartfield from prior sources available to both parties, the former would still be an infringer. That such prior sources were shown to exist could have no bearing except on the question whether Peterson copied from these sources rather than from Hartfield's code."

Applying the foregoing authorities to the facts presented by your letter, it is my opinion that the code prepared by your consultant, if released, would be an infringement upon the copyrighted code of the Pacific Coast Building Officials Conference.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1940.

Hon. Roy O. Hill, Clerk,
Circuit Court,
Houston County,
Dothan, Alabama.

Highway Patrolman — Fees as Witnesses—

Fees earned as witnesses by Highway Patrolmen to be covered into the State Highway Patrol Fund are a proper claim against the Fine and Forfeiture Fund of the County when the State fails to convict the accused and the claims have been registered.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of September 14, 1940, in which you request my opinion as follows:

"The Act creating the Highway Patrol provides that the Highway Patrolmen may prove attendance as witnesses in cases in courts, but that they, being paid salaries by the State, must turn over their witness certificates to the State Highway Patrol and that the Clerk must pay such witness fees to such fund instead of paying direct to the Patrolmen. When the State fails to convict in such cases, the witness fees of the patrolmen have been registered against the Fine and Forfeiture Fund of this and other counties. When the defendants are convicted and a fine is assessed against them and is paid, the entire amount of the fine and witness fees of the Patrolmen is paid to the State for the credit of the Highway fund.

"Won't you please give me an opinion as to whether or not the State, through its agency the Highway Patrol, has a proper and legal right to register and collect monies from the County, out of its Fine and Forfeiture Fund, under such circumstances as mentioned above.

"In the Acts of 1926-27, page 46, paragraph 3, is found the following: 'Provided that no fees of a Circuit Solicitor or trial tax—shall be taxed

against or paid out of the fine and forfeiture funds of any county.' This is the only legislative action I have been able to find concerning payments out of a County Fine and Forfeiture Fund to the State Treasury, and it does appear to me from this Section that it appears to be the intention of the legislature that Fine and Forfeiture Funds of the various counties should not be taxed for the benefit of the State treasury."

It is my opinion that registered claims of Highway Patrol Officers against the Fine and Forfeiture Fund for witness fees are valid claims.

As was said in the opinion to Hon. Walter K. McAdory, Chief of the Alabama Highway Patrol, under date of July 9, 1936, (Quarterly Report Attorney General, Vol. IV, page 23):

"When an officer, whether he be sheriff, constable or highway patrolman, is summoned as a witness in a criminal case, and he attends as such witness, he is not performing any official act, **but is performing an individual service.** Therefore, his attendance as such witness is not an official act and he would be entitled to his mileage and per diem." (Emphasis supplied)

This is true at this time except for the provision of Act No. 181 H. 245, approved March 18, 1939 (General Acts 1939, page 300, 307), which reads as follows:

"* * * No State Highway Patrol Officer shall be entitled to any costs, fees or mileage for attending any courts, but instead, the proper authorities shall collect such costs, fees and mileage that are due such officers for attendance on any court or for any official act and promptly turn the same over to the Director of Public Safety who shall cover the same into the Highway Patrol Fund * * *."

This office has held in numerous opinions that Highway Patrol Officers are entitled to the same fees as are other State witnesses. See Opinion to Hon. O. L. Andrews, Clerk of the Circuit Court of Jefferson County, under date of February 16, 1940, found in Vol. XVIII, of the Quarterly Report of the Attorney General, page 225.

Section 3763 of the Code of Alabama, 1923 reads as follows:

"3763. **How taxed and paid.**—The fees of witnesses, subpoenaed on the part of the state to appear before the grand jury, or before any court in which a criminal prosecution is pending, must be taxed against the defendant, if he is convicted, or against the prosecutor when the costs are imposed on him; but **if the defendant is not convicted,** and the costs are not imposed on the prosecutor, or if the indictment is withdrawn and filed, or the prosecution abated by the death of the defendant, or if the costs are imposed on either the defendant or the prosecutor, and an execution against him for the same is returned "no property found," or if no indictment is found by the grand jury before whom the witnesses appear, or if a nolle prosequi is entered in the case, **such fees must be paid by the county in the manner specified in section 3769 (6666).**" (Emphasis supplied)

I am of the opinion, therefore, that the fees due Highway Patrolmen as State Witnesses are valid claims against the Fine and Forfeiture Fund of the county where the defendant is acquitted, even though such fees are to be covered into the Highway Patrol Fund.

The mere fact that these fees accrue to the benefit of the State, or one of its agencies, in no way affects the validity of this claim. Cf. Opinion to Hon. B. P. Singleton, Chief Examiner of Public Accounts, under date of November 9, 1939 (Quarterly Report Attorney General, Vol. XVII, page 206).

The provision of Act No. 53, S. 68, approved February 18, 1927, found on page 45 of the General Acts of 1927, to which you refer in your inquiry, has no application in this connection, since that provision deals solely with fees of solicitors and the trial tax, and is not concerned with the fees of State witnesses.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1940.

Hon. Henry W. Sweet,
County Commissioner,
Jefferson County,
Birmingham, Alabama.

Jefferson County — Civil Service System—

Employees of the new Jefferson Hospital are subject to the Jefferson County Civil Service Law.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of September 10, 1940 follows:

"The Jefferson County Commission desires the Attorney General's opinion on the question of whether or not the new Jefferson Hospital that is being built in Birmingham will have its employees subject to the Jefferson County Civil Service Law.

"The funds for the construction and operation of this Hospital will be secured from the Federal Government on the basis that it outlined in the enclosed files. We have filed with P.W.A. an Amendatory Application requesting the Government to purchase an additional $97,000 of revenue bonds for construction purposes. If this request is approved we will then have available from the money granted by the Government in

connection with the Hospital, approximately $125,000 for use in paying the operating expenses of the Hospital, which will include the salaries of employees.

"Files embracing the above and complete contract with the Federal Government are enclosed for your information. (We will appreciate your returning P.W.A. Form No. 320.)

"In the operation of the Jefferson Hospital, Jefferson County will act as fiscal agent of the Federal Government, and no local tax funds are planned to be put into the Hospital operation. Jefferson County's Civil Service Law applies only to employees paid from the general fund of the County, and the Civil Service Board has complete authority without approval or concurrence of any elected body, for setting salaries of all County employees.

"Naturally we are anxious to have the question determined as quickly as possible, due to the fact that we must proceed with the selection of a Superintendent and employees necessary for the operation of the Hospital, which will be completed in November."

My answer to your inquiry is in the affirmative.

Section 1 of Act No. 284, H. 737, approved August 28, 1935 (Gen. Acts, 1935, p. 691), entitled Definitions, reads in pertinent part as follows:

"Section 1. * * * 'County,' 'The County,' 'Said County' or 'such County.' A County within the population class prescribed by this Act. 'Appointing Authority,' or 'Appointing Power.' Person, officer, board, council, commission or other body whose lawful jurisdiction or powers are confined wholly or primarily within the territorial limits of such county and who or which possesses final power to appoint persons to services, jobs, offices or positions, the compensation of which is paid in whole or in part from the public funds of such county or from the public funds of a municipality in such county subject to this Act. 'Employee' or 'Appointee.' Persons in the classified service herein set up and appointed by an Appointing Authority, unless herein specifically excepted."

It will be noted from the above that all persons in the employment of any county whose salary is paid in whole or in part from public funds, are subject to the provisions of Act No. 284, supra.

The sole question which presents itself in answer to your question is whether or not the $125,000 granted by the P.W.A. is public funds within the meaning of Section 1 of Act No. 284, supra.

In a very recent case, which came up in Jefferson County, the style of which case being **City of Bessemer, a municipal corporation, et al vs. the Personnel Board of Jefferson County et al.**, the Circuit Court of Jefferson County, Bessemer Division, held that the employees of the Public Utility Board of the City of Bessemer were subject to the Jefferson County Civil

Service Law, and that the funds granted to the Board by P.W.A. were public funds within the meaning of Act No. 284, supra. This case is now on appeal to the Supreme Court of Alabama. The Public Utility Board of the City of Bessemer is the agency which operates and maintains the Electrical Distribution System for the City of Bessemer and vicinity. The funds which this agency uses to maintain its plant were derived from the P. W. A. just as the funds for the operation of the Jefferson Hospital. The Electrical Distribution System of the City of Bessemer is, as is the Jefferson Hospital, a self-liquidating agency. This is to say, the profits from said Electrical Distribution System are to be used for the purpose of retiring the bonds which have been purchased by P.W.A. From a study of the papers sent to me along with the above request, I notice that the profits derived from the Jefferson Hospital are also to be used for the purpose of retiring the bonds purchased by P.W.A.

In view of the holding of the Circuit Court of Jefferson County, Bessemer Division, that the employees of the Public Utility Board of the City of Bessemer are subject to the Jefferson County Civil Service Law, I am constrained to hold that the employees of the Jefferson Hospital are also subject to the provisions of the Jefferson County Civil Service Law.

For your information, interns, resident physicians, student technicians and student nurses are in the unclassified service of the Personnel Board, and are not subject to the supervision and control of such Board. See subsections (a) and (b) of Section 2 of Act No. 410, H. 942, approved September 15, 1939 (Gen. Acts, 1939, p. 542).

I am returning herewith P.W.A. Form No. 230 as requested by you.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1940.

Hon. H. M. Hughes, Clerk,
Circuit Court, Madison County,
Huntsville, Alabama.

Costs and Fees — Fines — Clerk of Circuit Court — Department of Corrections and Institutions — Probation—

Procedure discussed in situation where one is sentenced to hard labor in lieu of payment of fine and costs imposed and sentenced is suspended upon condition that same be paid at a later date, and upon part payment probation order is extended to suspend the balance due.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 18, 1940, in which you request my opinion as follows:

> "In a conversation with our Circuit Judge, today, he remarked that he believed in some cases where a probationer has been assessed with fine and costs and had paid a part of same and was unable to pay more, it would serve society best to relieve him from further payments, since he had obeyed the probation order with the exception of making his payments ordered. This he was unable to do and support his family.
>
> "Understand the State Board of Administration, Convict Department has paid to me in said case the costs as required under section 3667.
>
> "I am asking for your official opinion if I shall pro-rate the amount paid to me by the probationer equally as to the amount paid to me by the State Board of Administration, Convict Department, Solicitors fee and half of the trial tax to State and half to the County, also the $1.00 difference in Sheriff's guard fee and the difference of $2.00 Court Reporter fee due the County. In other words pro-rate equally the full costs as assessed against the probationer by the court."

In answer to your inquiry, it is my opinion that the amounts collected by you should be applied as follows in the absence of any specific order of the court as to what disposition should be made:

(1) The trial tax should be paid in full.

(2) There should be an equal proration of the items of cost (exclusive of trial tax) in porportion to the amounts taxed and the amounts collected. For example, if the total amount of costs taxed (exclusive of trial tax) amounts to $100.00 and only $50.00 is collected, the Department of Corrections and Institutions should receive fifty percent of the amounts paid by it under Section 3667 of the Code of Alabama, 1923, less five percent commission allowed to the clerk for collecting and remitting same. The other funds or individuals to which the money should be paid, should be paid on the same pro rata basis.

(3) If there be sufficient moneys to pay all the items of cost, the balance should be applied to the payment of the fine and then remitted to the fine and forfeiture fund of the county or the special fund entitled thereto, as the case may be.

The opinion of this office rendered to the State Comptroller on October 14, 1940, should be read in connection with this request in so far as same is applicable. In said opinion the proper procedure to be followed is set out in detail in instances where one is sentenced to hard labor to pay the fine and costs imposed and sentence is suspended and the fine and costs are later paid in compliance with the conditions of probation. In the instant case, only part of the amounts to be paid are collected and, by later order of the court, the payment of the balance due is suspended.

In regard to the trial tax, I wish to reaffirm my previous holdings that a prospective probationer cannot be released from the payment of same as a condition of probation. **Opinion of the Attorney General to the State Comptroller** under date of October 14, 1940, supra; **Quarterly Reports of Attorney General,** Vol. XVII, page 40; **State v. Montevallo Coal Mining Co.,** 197 So. 89. It, therefore, follows that the trial tax should be first paid in full without regard to proration.

In connection with the powers of the court to suspend sentence upon such conditions as it may determine, I wish to refer you to that portion of the opinion to the State Comptroller, supra, wherein, after quoting Section 4 of Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434), the Probation Act, it was observed:

> "It will be seen from the above that the Court has authority to suspend the sentence to hard labor for the non-payment of the fine or costs or any portions thereof; and permit payment of said sums in such installments as it directs. It may exercise its discretion in each particular case as to whether or not the prospective probationer should be required to pay all or part of the costs. — Quarterly Report of Attorney General. Volume XVII, page 40."

An opinion of this office found in Quarterly Reports of Attorney General, Vol. XX, page 363, held that where a defendant is placed on probation by order of the court and is required to pay the costs of the case, such probationer should pay all the costs of the case and not just the portion which the State has paid under Section 3667, Code of Alabama, 1923. In said opinion it was stated:

> "When the order of the court is that the defendant pay the costs of the prosecution, this simply means all of the costs. Of course, the court could, if it should see fit, limit the payment of costs to any specific amount or to certain items of cost, but, when the order is to pay the costs, this would include all of the costs."

Under the facts presented in the instant inquiry, it is not stated whether or not the court designated the suspension of sentence as to any specific items of costs or the fine in its extended order of probation suspending the payment of the balance due. Therefore, a situation is presented analogous to one where a judgment is collected in part rather than in full. Where a judgment is obtained and is not collected in full, the costs of the case are the first items to be paid. **Biennial Report of Attorney General,** 1936-38, page 652. It, therefore, follows that the moneys collected in the instant case after the trial tax has been paid should be applied to the payment of the costs. If these costs have heretofore been paid in full, the fund or funds which said costs should be reimbursed accordingly. If there be not sufficient moneys collected to reimburse said fund or funds in full, the same should be reimbursed pro rata in proportion to the amounts collected. Cf. Opinion of the Attorney General rendered to the Clerk of the Circuit Court of Fayette County on June 17, 1932.

If the moneys collected are sufficient to reimburse the fund or funds which have heretofore paid the costs (and any individuals who would be entitled to fees but who were not paid heretofore), any balance due should be applied to the payment of the fine to be remitted to the fine and forfeiture fund of the county or a particular fund, as the situation may demand.

In view of the foregoing, it follows that the moneys in question should be applied in the manner set out in the first portion of this opinion in the absence of any specific order of the court as to the particular items for which payment is suspended.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

License — Hunting — Residence—

The words "permanently resides" as used in Sections 29 and 30 of Act. No. 24, S. 226, approved August 12, 1935 (Gen. Acts, 1935, page 632) construed not to mean "legal residence" or equivalent of "domicile," but simply a person's place of abode.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of October 4, 1940 follows:

"Please advise me your opinion on the following question.

"Can we issue county hunting license to a party that has lived in another county for several years but retains his citizenship in this county by being a qualified voter in our county?"

In my opinion, your inquiry should be answered in the negative.

Attention is first called to Sections 29 and 30 of Act No. 240, S. 226, approved August 12, 1935 (Gen. Acts, 1935, page 632) which are respectively as follows:

"29. Any person who has been a bona fide resident of this State for six months next preceding may procure a county hunting license for himself or herself by filing his or her application with the person in the county in which he or she permanently resides, duly authorized to issue said license, stating his or her age, color, place of residence, post office address, and after paying to the person issuing same a license fee of one ($1.00) dollar."

"30. Any person who has been a bona fide resident of the State for six months next preceding may procure a State hunting license for himself or herself, by filing with any duly authorized person in any county of the State to whom he or she applies for license, the application provided in the preceding section, and after paying to the person issuing said license a fee of three ($3.00) dollars."

It will be noted from reading the above quoted provisions of law that every person who has been a bona fide resident of this State for six months next preceding, is entitled to procure a county hunting license in the county in which he or she permanently resides, and is also entitled to procure a state-wide hunting license.

The question to be determined before your inquiry can be answered is what is the meaning of the words "permanently resides" as used in Section 29, supra.

In 19 C. J. Sec. 2, page 395, is found the following statement:

" 'Residence' simply indicates the place of abode, whether permanent or temporary; 'domicile' denotes a fixed, permanent residence, to which, when absent, one has the intention of returning."

The Supreme Court of Alabama in the case of **Allgood v. Williams,** 92 Ala. 551, 8 So. 722, held as follows:

"Though the word 'residence' is often used to signify a temporary abode, it is also used to signify a fixed and permanent home. 'Residence' and 'domicile' are not in all respects convertible terms; but when 'residence' or 'resides' is employed in a statute relating to succession, grant of administration, and of guardianship, it is generally construed to mean the legal residence, and as equivalent to 'domicile'. Jac. Dom. Sec. 75. The same author observes: 'In fact, the great bulk of cases of domicile reported in the American books are cases of statutory residence. This is especially true with regard to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce, probate, and administration, etc. With respect to these subjects, there is substantial unanimity in holding statutory "residence" to mean "domicile." ' "

In view of the foregoing authorities, it is my judgment that the words "permanently resides" as used in Section 29, supra, do not mean legal residence or the equivalent of domicile as said terms have been defined, but simply indicate a person's place of abode.

Furthermore, the fact that both sections 29 and 30, supra, provide that "any person who has been a bona fide resident of this State for six months next preceding" is entitled to procure the license provided for therein, clearly shows to my mind that it was not the intention of the Legislature to require legal residence before a person could procure such license, but merely the act of living within the State for said period of time.

It therefore follows, in view of the conclusion hereinabove reached and as applied to the facts presented in your letter, that the party referred to in your inquiry would not be entitled to a county hunting license in Elmore County, Alabama. He would, however, be entitled to a county hunting license in the county in which he is now living and also to a state hunting license, which, under the statute may be procured from the duly authorized person in any county of the State.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1940.

Hon. Fred Grantham, Clerk,
Circuit Court, Geneva County,
Geneva, Alabama.

Costs and Fees — Circuit Clerks—

1. Department of Corrections and Institutions may not properly pay clerk's fee for preparing transcripts in cases appealed to the Supreme Court or the Court of Appeals in misdemeanor cases.

2. Opinion appearing in Quarterly Report of Attorney General, Volume XVIII, page 265, modified and clarified.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 17, 1940, in which you request my opinion as follows:

"Referring to Quarterly Report of Attorney General of Alabama for the period from January 1, 1940, through March 31, 1940, Vol. XVIII, page 265, Opinion to Hon. E. T. Carpenter, Clerk, Circuit Court, Washington County, Chatom, Alabama, I respectfully request your opinion, as follows:

"It has been the practice of the Clerk of the Circuit Court of Geneva County, Alabama, in preparing cost bills in Penitentiary and Hard Labor

cases where transcripts or records to the Supreme Court or Court of Appeals were made, to include in the cost bills the proper charge for making such transcripts or records, as well as all other items of cost chargeable under Section 3667, Code of 1923. In cases where such cost bills were returned marked 'for correction,' rejecting the charge for making transcripts of records to the Supreme Court or Court of Appeals, the cost bills would be 'corrected' not to include such items of cost rejected, and would thereafter be paid by the Department.

"Since the procedure of originally charging for making transcripts or records to the Supreme Court or Court of Appeals was followed, although these items were not included in the 'corrected' cost bills because of the refusal of the Department of Corrections and Institutions (formerly otherwise designated) to honor same for payment, would not the Clerk of the Circuit Court of Geneva County be entitled to his fees for making transcripts or records to the Supreme Court or Court of Appeals although twelve months or more had elapsed since payment of the 'corrected' bills of cost and/or since the filing of the original bills of cost including all items chargeable under Section 3667, Code of 1923?

"The question has been raised as to whether the Statute of Limitations of twelve months would apply, and I respectfully request your opinion as to whether the Statute of Limitations would apply under the conditions outlined in the foregoing paragraphs?"

I assume from the foregoing request that you construe the opinion appearing on page 265 of Volume XVIII of Quarterly Reports of Attorney General, to mean that the Department of Corrections and Institutions is authorized to pay Circuit Clerks fifteen cents per one hundred words for preparing transcripts in misdemeanor cases appealed to the Supreme Court or Court of Appeals of this State, when the same are affirmed on such appeals.

I realize that the language used in the above referred to opinion is, in this regard, perhaps not well chosen and could reasonably lead to the conclusion reached by you that the Department of Corrections and Institutions is chargeable with this fee.

When the above opinion was prepared, the question of whether or not this fee was payable out of the funds of the Department of Corrections and Institutions was not considered. It was not the intention of this office to hold, and it was not held, in said opinion that clerks would be entitled to this fee out of the funds of the Department of Corrections and Institutions.

This is to advise you that I am extending said opinion to the effect that in misdemeanor cases which are appealed to the Supreme Court or Court of Appeals, and such appeals are affirmed, the Department of Corrections and Institutions is not required to pay circuit clerks for making transcripts in such cases, regardless of the fact that the total costs paid by the Department of Corrections and Institutions does not exceed $250.00. Your attention is called to an opinion found in Quarterly Reports of Attorney General, Volume XVII, page 210, which is the controlling opinion on the question here considered, which opinion is hereby affirmed and considered the last official ruling of this office.

In view of the above, it is not necessary for me to determine whether or not there is any statute of limitations on the claims here considered.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1940.

Hon. William Varner,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

Rolling Stores — Licenses —

1. A person operating three rolling stores in three different counties, who never takes any one of said stores across the county line, is required to pay license as set out in Schedule 146 of the Revenue Code of 1935, as amended, but not required to pay an additional state and county license in such county.

2. Under the provisions of subsection (b) of Section 350 of the Revenue Act of 1935, a person is required to pay a county license of 50% of the state license imposed on rolling stores.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of October 15, 1940, follows:

"John Doe wants to operate a rolling store in Tallapoosa County, another rolling store in Lee County and another rolling store in Macon County. What amount shall he pay in each county?"

I assume from the above request that John Doe lives in Macon County and operates three separate rolling stores, one store in Macon County, one store in Lee County and one store in Tallapoosa County, but never operates any one of said rolling stores in more than one county.

Subsection (c) of Schedule of 146 of the Revenue Act of 1935 as amended by Act No. 230, II. 180, approved March 2, 1937 (Gen. Acts, 1936-37 Extra Session, (page 277) reads as follows:

"(c) Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this Schedule displaying, selling or offering to sell any goods, wares or merchandise of whatever nature, at re-

tail shall pay to the State in order to engage in such business the following licenses: Upon one (1) motor vehicle, the annual license for each such motor vehicle, not in excess of one, so used, of—$100. Upon two motor vehicles, or more, but not to exceed three, the annual license fee for each such additional motor vehicles shall be—$130.00. Upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be—$150.00. Upon each motor vehicles in excess of six, for each such additional motor vehicle $200.00. In addition to the above, there is levied a license of—$50 for the State and a county license of $50 in each additional county in which said business is conducted. Rolling stores which are controlled or held with others by stock ownership of 25% or ultimately controlled or directed by one management or association of ultimate management, shall be deemed for the purpose of this Schedule as being owned by the same person."

It being admitted in the above request that all three of the rolling stores are owned by the same person, it follows that the license imposed by the above quoted subsection is $100.00 for one rolling store, and the license on two rolling stores and not in excess of three, $130.00 for each additional store.

The above quoted subsection further provides that an additional license of $50.00 for the State and $50.00 for the county shall be paid on rolling stores in each additional county in which such rolling store is operated. However, I construe this provision to mean that each individual rolling store must be operated in more than one county before this additional license would attach. Under the facts stated in your request, John Doe would not, in my opinion, be liable for this additional license.

Subsection (b) of Section 350 of the Revenue Act of 1935 reads as follows:

"(b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

It being not otherwise provided in the Revenue Act of 1935, in my opinion, John Doe would be liable for a county license of 50% of the State license on each of his rolling stores.

Premises considered, you are advised that John Doe should pay the following license on his rolling stores:

Macon County—(Based on the assumption that he lives in Macon County)—

State license, $100, County License, $50, Total $150;

Lee County—

State License, $130, County license, $65—Total $195;

Tallapoosa County—

State license, $130, County license, $65—Total $195.

Your attention is called to the fact, however, that if John Doe operates any one of these rolling stores in more than one county, he would subject himself to the additional license of $50.00 for the State and $50.00 for the county in each additional county in which said store is operated, as provided in Schedule 146, supra.

The opinion reported in Quarterly Report of Attorney General, Volume I, page 90, apparently in conflict with these views expressed above, was based on the statute prior to its amendment by the 1936-37 Legislature, as noted above, and in view of this amendment is no longer applicable.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1940.

Hon. James A. Crane,
Register, Circuit Court,
Mobile County,
Mobile, Alabama.

Register in Chancery — Costs and Fees — Certificate —

1. Statement which Register in Chancery is required to place on obligations validated under the provisions of Act No. 196, H. 449, approved July 17, 1935 (General Acts 1935, page 582), held to be a certificate.

2. Register in Chancery held to be entitled to fee of 25c provided by Section 7283 of the Code of Alabama, 1923, for making each such certificate, said fee to be paid by the unit issuing such obligations.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your request for an official opinion which is as follows:

"The City of Mobile has requested me to sign approximately 14,000 Refunding and Funding Bonds of the City, which it proposes to issue

under its Refunding Plan, my signature being required by Section 6 of Act No. 196 of the Legislature of 1935 (General Acts Alabama, pages 582-5). That section reads as follows:

> " 'Section 6. — Obligations validated under the provisions of this Act, shall have stamped or written thereon by the proper officers of such unit the words: "Validated and confirmed by decree of the Circuit Court of ..... County, State of Alabama, rendered on the ..... day of ....., 19....,", which shall be signed by the Register of the Circuit Court in which the decree was rendered, and such entry shall be original evidence of said decree in any Court in this State.'

"I am wondering whether or not I would be compelled under Section 7283 of the Code to charge a fee of 25c for each time I sign one of these bonds. That Code section provides the charges of the Registers in Chancery, and the only part of it which could be construed to be applicable reads:

> " 'For each certificate or affidavit, when official seal is not required, 25c.'

"You can very readily see that this amounts to a very substantial sum of money to the City of Mobile, and I would, therefore, appreciate it if you would give me your instructions in the matter at your earliest convenience.

"I am enclosing herewith a letter written to me by the City Attorney, which outlines his views to the effect that the charge should not be made in this matter."

The Act to which you refer in your letter of inquiry is Act No. 196, II. 449, approved July 17, 1935 (General Acts 1935, page 582), which is an Act providing for the validation of certain bonds, certificates of indebtedness and time warrants to be issued by counties, cities, towns, villages, districts and other political subdivisions of the State. You have set out in your letter of inquiry Section 6 of said Act, and also the pertinent part of Section 7283 of the Code of Alabama, 1923. Section 7 of said Act provides as follows:

> "Section 7. The costs in any proceeding under this Act shall be paid by the unit issuing such obligations."

If the statement which you are required, as Register in Chancery, to place upon obligations validated under the provisions of said Act, by Section 6 thereof, is a certificate, then you are entitled to the fee of 25c provided for in the excerpt from Section 7283 of the Code of Alabama, 1923, quoted in your letter of inquiry, and the unit issuing the obligations, instantly the City of Mobile, under Section 7, supra, is liable for the payment of this fee.

The word, or term, "certificate" is defined in 11 C. J., page 76, as follows:

"CERTIFICATE. A writing made in any court and properly authenticated to give notice to another court of anything done therein; a writing giving assurance that a thing has or has not been done, that a fact exists or does not exist; a writing by which an officer or other person bears testimony that a fact has or has not taken place; a writing by which testimony is given that a fact has or has not taken place; a writing so signed and authenticated as to be legal evidence; a written testimoney to the truth of any fact; a statement in writing by a person having a public or official status concerning some matter within his knowledge or authority; a documentary declaration regarding facts from the public authority, as an attestation of facts contained in a public record; a declaration in writing."

It is defined in like manner in Words & Phrases. See definitions in Words & Phrases, 1st Series, Vol. 2, pages 1029-30; 2nd Series, Vol. 1, pages 611-12; 3rd Series Vol. 1, pages 1087-88; 4th Series, Vol. 1, pages 373-74; 5th Series, Vol. 1, page 862.

"The term 'certificate,' as used in the statute fixing the fees of officers, means a formal certification of some fact, such as the certificate attached to a judgment roll, or to a certified copy of a record or paper, and does not embrace a jurat. Comstock Mill & Min. Co. v. Allen, 31 P. 434, 436; 21 Nev. 325. See, also, U. S. v. Julian, 16 S. Ct. 801, 162 U. S. 324, 40 L. Ed. 984." Words & Phrases, 1st Series, Vol. 2, pages 1029-30.

"A 'certificate' is 'a writing giving assurance that a thing has or has not been done; * * * that a fact exists or does not exist.' Cook v. Ziff Colored Masonic Lodge No. 119, 96 S. W. 618, 620, 80 Ark. 31 (quoting and approving definition in Anderson's Law Dictionary.)." Words and Phrases, 2nd Series, Vol. 1, page 611.

Measured by the definitions of the word, or term, "certificate" above set out, the conclusion seems inescapable that the statement which you are required, as Register in Chancery, to place on obligations validated under the provisions of Act. No. 196, supra, which statement is a written declaration or testimony of the fact or facts that the obligation on which it is placed has been validated and confirmed by decree of the Circuit Court of which you are Register in Chancery rendered on a certain date, is a certificate.

The premises considered, it is my opinion that you, as Register in Chancery, are entitled to a fee of 25c for each such certificate, as provided by the pertinent part of Section 7283 of the Code of Alabama, 1923, set out in your letter of inquiry, which fee must be paid by the unit issuing the obligations, instantly the City of Mobile, as provided by Section 7, supra. Of course, the above does not mean that you are entitled to this fee personally, since you are on a salary, and the fees to which you are entitled, as Register in Chancery, must be collected by you and covered into the County Treasury of Mobile County.

In reaching the above conclusion, I have not been unmindful of the fact that Section 168 of the Constitution of Alabama of 1901 provides that Registers in Chancery shall "receive as compensation for their services only such fees and commissions as may be specifically prescribed by law." Nor have I been unmindful of the well-established and settled principle of law in this State that the law of costs and fees is penal and must be strictly construed, and that an officer claiming a fee must point to specific statutory authority therefor. It suffices to say in this regard that in my judgment the part of Section 7283 of the Code of Alabama, 1923, set out in your letter of inquiry specifically prescribes a fee of 25c in the instant case and is specific authority for your claiming and collecting the same.

Your very truly,

THOMAS S. LAWSON,

Attorney General.

October 24, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
The Capitol.

Registers — Commission — Section 7283, Code of Alabama, 1923. Section 2139, Code of Alabama, 1923.

Register authorized to charge commissions as item of costs against unsuccessful part litigant.

Commissions of register, being charged as costs, are part of court costs provided in Section 2139, Code of Alabama, 1923.

Register not entitled to commissions on Court Costs.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 2, 1940, in which you request my official opinion as follows:

"Will you please give me an official ruling on the following questions:

"1. Does the law contemplate that the Register's commissions for making sales, and receiving and distributing money other than that arising from sales, as provided by Section 7283, Code of 1923, page 593, shall be taxed against the respondent when there is a recovery by the complainant, or should same be deducted from the proceeds of the judgment when same is paid over to the complainant?

"2. Should such commissions as provided in said Section 7283 above be construed as 'Costs' and as such included in those items, the total of which is limited to $10.00 by the provisions of Section 2139?

"3. In cases where a sale of property is made under a decree of the court and the bill of costs included an advertising fee which has been paid by the complainant, and is therefore a part of the amount to be remitted to said complainant, should a commission be deducted by the Register and interest? (In this connection, attention is called to the language of Section 7283 — 'For receiving, keeping and paying out or distributing money, other than that arising from sales—'. Would not this include **all** money collected, in these cases, for the benefit of the City of Mobile?).

"The particular cases to which we have reference are those filed by the City of Mobile as Complainant, and against various property owners of the city, as respondents. The purposes of such cases is to enforce payment of ad valorem tax assessments levied by the city, or certain public improvement assessments made against the property, and which tax levies or street improvement assessments have become delinquent.

"Usually, there are two methods of disposing of these cases, viz:

"(1). The respondent taxpayer comes into the office of the Register, pays the amount of the delinquent assessment and interest, together with accrued costs, and the case is dismissed.

"(2). Judgment is entered against the respondent for the amount of the assessment, plus costs of the proceedings, and decree is entered ordering sale of the property to satisfy the judgment.

"Section 7283, (page 595, par. 5, Commissions on sales) Code of 1923, provides certain commissions to be allowed the Register in each of the above instances. And heretofore, it has been the practice of the Register here to add such commissions to the bill of costs, in which event the commissions in case No. 1 would be paid by the respondent taxpayer, and not deducted from the amount of the judgment when remitted to the city as is customary in collecting monies due the State or County.

"We have taken the position that the commissions should not be construed as costs and thus taxed against the Respondent, but rather that they should be deducted from the amount of the judgment when same is remitted to the City. The Register, Mr. Crane, took issue with us on the matter, hence our query as quoted in your letter above referred to.

"Simply stated, what we want to know is whether the commissions should be taxed against the respondent as a part of the costs when he comes in and settles the case before a decree of sale is entered. And further if they should be taxed as costs and added in on the total sale price when the property is sold under a decree of the court."

The pertinent part of Section 7283, Code of Alabama, 1923, is as follows:

"7283. Fees allowed to registers. — Registers are entitled to the following fees for the following services: * * *

"Commissions on sales: For the first one hundred dollars, two per cent; for all over one hundred dollars, and not exceeding one thousand dollars, one and one-half per cent; for all over one thousand dollars and not exceeding twenty thousand dollars, one per cent; and for all over twenty thousand dollars, one-fourth of one per cent. For receiving, keeping, and paying out or distributing money, other than that arising from sales, on the first one thousand dollars, one per cent; on all over one thousand dollars and not over five thousand dollars, three fourths of one per cent; on all over five thousand dollars, not exceeding ten thousand dollars one-half of one per cent; and all over ten thousand dollars, one-fourth of one per cent; receiving, keeping, and paying out money paid into court under a decree in favor of an administrator ad litem, one-half of one per cent on the amount so received and paid out; * * *"

In my opinion, your questions 1 and 2 should be considered together. I believe that before your question No. 1 can be answered, an answer must be made to your question No. 2. I am of the opinion that the commissions provided for in the above quoted provision of law are "costs". I believe this conclusion is borne out by a decision of the Court of Appeals of this state in the case of **Sloss-Sheffield Steel & Iron Company v Brooks,** 19 Ala. App. 107, 96 So. 81, cert. den. 96 So. 83. In this case, the Court of Appeals had under consideration that part of Section 7278 of the Code of Alabama, 1923, which became law under the terms of an act approved September 30, 1919, which is as follows:

"Collecting money on judgments where said judgment has not been paid within thirty days after its rendition, one-half the percent allowed sheriffs for the same services for collecting money on executions."

The Court did not specifically have under consideration the question as to whether or not such commissions were costs, but the opinion of the Court deals with such commissions as costs.

If the commission here under consideration is an item of costs, then the court has the power and authority to impose the payment of the costs as it sees fit. Section 6655 of the Code of Alabama, 1923, is as follows:

"Section 6655. Costs at discretion of circuit judge. — Costs may be apportioned at the discretion of the circuit judge; and in all cases where costs are decreed against any party who has given security for costs, execution may issue against such security."

I am of the opinion that where the costs are imposed upon the respondent, that it is the duty of the Register to collect his commission for receiving and distributing monies from the respondent rather than by de-

ducting his commission from the amount of money paid over to the register to be paid to complainant.

In answer to that part of your inquiry No. 2 wherein you ask as to whether or not the commissions here under consideration are costs within the purview of Section 2139 of the Code of Alabama, 1923, it is my opinion that such commissions are costs and are limited to $10. in cases affected by said Section 2139.

In answer to your inquiry No. 3, I call your attention to the pertinent parts of Section 7283 of the Code of Alabama, 1923, which provides:

> "Registers are entitled to the following fees for the following services: — for receiving, keeping and paying out or distributing money other than that arising from sales, on the first thousand dollars one per cent; * * *"

I do not believe that the Legislature intended to pay the Register a commission on court costs, hence the reimbursement of the city for part of the court costs, advanced by the city, falls within the same category as costs and the Register would not, in my opinion, be entitled to a commission on the same.

Your very truly,

THOMAS S. LAWSON,

Attorney General.

October 24, 1940.

Hon. Coma Garrett, Jr.,
Judge of Probate, Clarke County,
Grove Hill, Alabama.

Fee for Certificate, Hospitalization—

The fee of 50c allowed the Probate Judge for making certificate for admission of a patient to an insane hospital, is payable out of the estate of the person himself and not by the State or County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 16, 1940, in which you request my official opinion as follows:

> "In an opinion to Honorable Charles W. Lee, State Comptroller, Capitol, under date of August 13, 1938, Biennial Report of the Attorney General 1936-38, the Attorney General held:

"'The Probate Judge is entitled to 50c for making certificate of admission of patient to insane hospital.' The certificate there referred to is the certificate provided for by Section 1444 of the Code of Alabama, 1923, and the fee therein referred to is provided for in Section 7285 of the Code of Alabama, 1923. This opinion, however, is silent as to the source from which this fee should be paid.

"Please advise me whether this 50c for making this certificate should be paid by the patient, the person legally responsible for his support, the county, or the state. If you hold that this fee, as the usual rule, should be paid by the patient or the person legally responsible for his support, and the patient is a pauper and has no person legally responsible for his support, should this fee then be paid by either the state or the county?"

In answering the above, I find no provision of law authorizing either the state or the county to pay this fee. It has been repeatedly held by our Supreme Court, and also by opinions of this office, that before the county can assume any financial responsibility, it must be able to point to some direct statute, or the construction of some statute, authorizing such expenditures. The court of county commissioners, board of revenue, or other like governing body, being purely a creature of the statute and not of the constitution, deriving all of its authority and power from legislative enactment; it has no constitutional life or power. **State v. Street et al,** 117 Ala. 203, 23 So. 807; **Edwards v. Williams,** 70 Ala. 145.

I am of the opinion that Section 1445 of the Code of Alabama, 1923, which is as follows, has no connection whatever with this fee and could not be used as an authority authorizing the county to pay for same.

"**1445. Conveying Patient to hospital.** — The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital, and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

I do not think that it can be seriously contended that above section has any reference to anything except the act of conveying the insane person to the hopital and it is referring to this expense and to no other, and not to the expense preparatory to so conveying.

Therefore, it is my opinion that this fee is chargeable against the estate of the insane person, and not to the State or County even though the patient be indigent.

Your very truly,

THOMAS S. LAWSON,

Attorney General.

October 24, 1940.

Hon. J. C. Coleman,
Circuit Clerk and Register,
Greene County,
Eutaw, Alabama.

Trial fee — Judgment entry — Clerks of Circuit Courts —

1. Where a criminal case is nol-prossed and continued to the next term of Court, and when called for trial at such term is nol-pressed, the Clerk is entitled to a trial fee, but not to fee for entering judgment.

2. Where trial of case is formally begun after plea of not guilty, and the Solicitor sees that he does not have sufficient evidence to convict the defendant and nol-prosses the case, the Clerk is entitled to trial fee, but not to fee for entering judgment.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of September 24, 1940, in which you request my official opinion as follows:

"Sometime ago your office ruled that where a case was nol-prossed the clerk could not get a fee for trial of 50c and judgment entry 25c.

"Kindly advise if this case were tried and the jury could not agree and a mistrial was entered and case continued. The next term of court the Solicitor has this same case nol-prossed, would the clerk then be entitled to a trial. This often happens and there is a trial and judgment entry. Also it often happens that we start a trial and after going into it the Solicitor sees he has no case and he will stop the trial and enter a nolle prosequi."

For the sake of clarity, I shall restate the questions contained in the above request.

You first ask if you, as Clerk of the Circuit Court, would be entitled to a trial fee and the fee for entering judgment where a case has been tried before a jury, and the jury could not agree and the Court made an order entering a mistrial and continued the case to the next term of court, the case when later called for trial being nol-prossed by the solicitor.

My answer to that part of your first question, having to do with trial fee, is in the affirmative. It is my opinion that the situation as outlined above is not governed by the opinion of this office rendered to Hon. J. R. Alldredge, Chairman of the Board of Finance and Control, Cullman County, Alabama, under date of February 5, 1940, and appearing in Quarterly Re-

port Attorney General, Vol. XVIII, page 161. In the situation as outlined above there was in fact a trial which resulted in a disagreement of the jury, the Court making an order of mistrial and continuing the case. It is clear that an issue was submitted to the jury. This being true, it is my opinion that you would be entitled to the trial fee.

My answer to that part of your first question having to do with the fee for entering judgment is in the negative. This office has heretofore ruled that when a case is nol-prossed the Clerk is not entitled to a fee for entering judgment in such case. Your attention is called to an opinion of this office rendered under date of December 18, 1934 to Hon. S. M. Cobb, Clerk of the Circuit Court of Wilcox County, Alabama (Biennial Report Attorney General, 1934-36, page 29). In this opinion this office held:

> "Section 3739 of the Code of Alabama does not enumerate such a fee in the fees listed which the clerk is entitled to charge in criminal cases. The Clerk of the Circuit Court is not entitled to this twenty-five cents (25c) fee for such final judgment entered for each defendant in cases where two or more defendants are jointly indicted and where the State fails to convict or there is a nolle prosequi in the case. The provisions of law for a clerk to receive a fee for entering judgments specifically states that such provisions cover the **entering** of a **judgment against each defendant** and where the State does not convict the defendant, or the State enters a nolle prosequi in the case, there is no judgment against the defendant. Where, in a case the indictment or the complaint is withdrawn and filed, there is no judgment against a defendant, unless the defendant is convicted. The fee for entering judgment is not for entering a judgment in a case, but for entering the judgment **against the defendant.**"

The second inquiry presented in your request is whether or not a Clerk is entitled to a trial fee and also a fee for entering judgment in a case where the Solicitor, after formally entering upon a trial of the issues involved, finds that he does not have sufficient evidence to make out a case against the defendant, and therefore requests the Court to enter a nolle prosequi.

It is my opinion that the first part of your second inquiry with reference to the trial fee in such a case should be answered in the affirmative. The word "trial" has been defined by our Supreme Court, in the case of **Byers v. State,** 105 Ala. 31, 16 So. 716, as follows:

> " 'The investigation of a matter in issue between opposing parties before a tribunal competent to decide upon it;' and that 'in a criminal case the term does not include the arraignment, or any other merely preparatory proceeding which may be taken prior to the time of administering the requisite oath to the jury.' "

Our Supreme Court, in the case of **Hirschfelder v. The State,** 19 Ala. 534, held:

> "A trial is the examination or investigation of an issue, either in fact or law. The finding or framing of an indictment by a grand jury is an ex parte proceeding, and cannot in any sense of the term be said to be a trial."

It is my judgment that when a defendant has been brought before a court which is competent to try the offense with which he is charged, and the defendant has pleaded "not guilty," and the court enters upon the trial of the case, then in truth and in fact, an examination or investigation of an issue, either in fact or in law, has been commenced. This being true, under the provisions of the above quoted excerpts the result is a trial, regardless of whether it is pursued to a final determination or is nol-prossed by the Solicitor because of a lack of evidence necessary to make out a proper case. Furthermore, in view of the holding in the case of **Hirschfelder v. The State,** supra, to the effect that the finding or framing of an indictment by a grand jury cannot in any sense of the term be said to be a trial, it is my judgment, even though the indictment upon which the defendant was tried was later held to be void by the Supreme Court of Alabama, that the same would in no sense change the fact that a trial had been had. It therefore follows, and is my opinion, that under such circumstances a Clerk is entitled to a trial fee.

My answer to the second part of your second inquiry, having to do with the Clerk's fee for entering judgment in such a case, is in the negative. This conclusion is based upon the reasoning heretofore set out in answer to the second part of your first inquiry.

What I have said hereinabove and the rules herein laid down be applicable to a case tried before a jury, as well as to non-jury cases.

Your very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1940.

Hon. Walter B. Jones,
Director of Conservation,
Capitol.

Fines and Forfeitures collected for violations of game and fish laws cannot be applied to pay costs in other cases where the defendant was acquitted or was insolvent and unable to pay after conviction, under Section 3850(2) of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion, under date of October 17, 1940, is as follows:

"Re: Request for Official Opinion relative to the legality of a Justice of the Peace taking from a fine and forfeiture fund money to pay costs of acquittals or jail sentences in game violation cases.

"This Department has had several cases where a Justice of the Peace would fine several defendants and deduct from the fines the amount equal to the court costs in other cases which he had acquitted.

"According to Section 3850, subsection 2, of the 1923 Code of Alabama, it is the duty of every Justice of the Peace:

> " 'To collect all fines imposed where the defendant is not sentenced to jail or hard labor to pay same; or an appeal is taken. He may deduct from fines and forfeitures collected by him, the amount due for his fees and those of the constable in cases in which the defendant was acquitted, or insolvent and unable to pay after conviction, a sum not to exceed fifty dollars for any calendar month; . . . '

"Section 44 of an Act of the Legislature (No. 240, S. 226, Swift) provides as follows:

> " 'All money arising from the sale of hunting and fishing licenses, penalties, forfeitures, etc., and from permits or other sources, relating to or growing out of the administration and enforcement of the game and fish laws of this State, shall be forwarded on the first day of each month to the Commissioner, by the officer, court or other person authorized to collect same and shall by the Commissioner be remitted to the State Treasurer who shall deposit same in a separate fund to be known as the "Game and Fish Fund".'

"Inasmuch as the Game and Fish Fund, part of which is derived from penalties in game violation cases, is a distinct and earmarked fund, this Department believes that the Justices of the Peace are without authority to deduct from their fine and forfeiture fund costs in cases which have been acquitted, but that the entire fine should be remitted to the Department of Conservation as provided for in the above quoted Act.

"Will you kindly render an official opinion, advising whether or not the Justices of the Peace must forward to the Department of Conservation all fines levied in their courts for violations of game law and/or game regulations."

In my opinion your inquiry should be answered in the affirmative. I think a Justice of the Peace is without authority to deduct from fines collected in game and fish cases, costs in other cases where defendants are insolvent.

I first call your attention to Section 48 of Act No. 240, S. 226, approved August 12, 1935 (General Acts, 1935, page 632), which is as follows:

> "Section 48. Justices of the Peace or the inferior criminal courts of the counties of the State of Alabama shall be and are hereby given final jurisdiction to try and convict persons, firms or corporations violating any of the provisions of the game and fish laws, or the rules and regulations promulgated thereunder; and they shall remit to the Commissioner on or before the first day of each month all fines and forfeitures col-

lected by them for the violation of such laws, rules and regulations, as prescribed in the game and fish laws, together with a statement of the name of the person, firm or corporation convicted of such violation, the time of such conviction, the amount of the fine or penalty, the date of the remittance, and the specific charge for which the defendant was tried."

It will be noted that the above quoted section requires justices of the peace to remit to the Commissioner of Conservation of Game, Fish and Seafoods on or before the first day of each month all fines and forfeitures collected by them by virtue of convictions had in their courts for the violations of the game and fish laws, rules and regulations.

Attention is next called to Section 44 of Act No. 240, supra, which is as follows:

"Section 44. All money arising from the sale of hunting and fishing licenses, penalties, forfeitures, etc., and from permits or other sources, relating to or growing out of the administration and enforcement of the game and fish laws of this State, shall be forwarded on the first day of each month to the Commissioner, by the officer, court or other person authorized to collect same and shall by the Commissioner be remitted to the State Treasurer who shall deposit same in a separate fund to be known as the 'Game and Fish Fund.' Said Game and Fish Fund shall be used for the payment of the salary of the Commissioner, and for all necessary incidental expenses, and further for the payment of the salaries and expenses of the game and fish wardens and agents, and the salaries of all employees of the Department, and further for the purchase, transportation, propagation and planting of brood stock of game birds and animals, and further for the acquisition of lands as provided in this Act, and the purchase, propagation and distribution of fresh water fish. The expenses incurred for any purpose under the provisions of this Act shall be limited to the amount of money in the Game and Fish Fund, and in no event shall said fund, or any part thereof, be spent for any purpose other than as provided in this Act, and at no time shall said revenues or any part thereof be spent for any purpose by any official, employee, agent or institution of the State of Alabama, but shall remain in the Game and Fish Fund to be spent for the purposes for which same were collected."

From a reading of Section 44, supra, it will be seen that the Commissioner is required to remit all monies received by him from any officer or court, growing out of the enforcement of the game and fish laws of the State, to the State Treasurer, who, in turn, is required to deposit the same in a special fund known as the "Game and Fish Fund."

It therefore follows and is my opinion, inasmuch as the above quoted provisions specifically provide for the disposition of fines and forfeitures collected for violations of the game and fish laws, that a justice of the peace is not authorized, under the provisions of Section 3850(2) of the 1923 Code of Alabama, to apply such fines and forfeitures so collected by him to the payment of costs in other cases where the defendant is acquitted or is insolvent and unable to pay after conviction. In other words, fines and for-

feitures collected by a justice of the peace for the violations of game and fish laws must be handled in accordance with the expressed mandates of Sections 44 and 48, supra, and cannot be applied as provided for in Section 3850(2) of the Code, supra. See opinion of this office to Hon. Ben Reeves, Sheriff, Pike County, Troy, Alabama, dated January 30, 1939, Quarterly Reports of Attorney General, Volume XIV, page 63, which opinion holds that fines collected in Highway cases must be remitted without deducting therefrom costs in other cases where the defendant is insolvent.

I deem it advisable to point out that the Department of Game, Fish and Seafoods (created by Act No. 240, supra) was abolished and all its powers, functions and duties were transferred to and conferred upon the Department of Conservation by the Department of Conservation Act of 1939 (Act No. 162, H. 52, approved March 14, 1939, General Acts, 1939, page 255). Section 7 of this act confers upon the Director of Conservation all the power and authority any officer or employee had in connection with any department, board, bureau, commission, agency, or office, the duties of which were transferred to and conferred upon the Department of Conservation by said act, and, therefore, the fines and forfeitures collected by justices of the peace for violations of game and fish laws should now be remitted by them to the Director of Conservation of the State of Alabama.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1940.

Hon. H. M. Hughes, Clerk,
Circuit Court, Madison County,
Huntsville, Alabama.

Costs and Fees—Clerks of Circuit Courts—Department of Corrections and Institutions—Probation—

When money is paid to clerk of circuit court in compliance with order of probation, and later probation is revoked and probationer delivered to Department of Corrections and Institutions to serve sentence, said money should be remitted to Department of Corrections and Institutions.

Opinion by Assistant Attorney General Screws

Dear Sir:

I have your letter of October 17, 1940, in which you request my opinion as follows:

"I received two opinions from you today with reference to fines and costs in probation cases. I consider your ruling in such cases to be fair and just.

"In my request for an opinion last December 11, 1939, with reference to fines and costs in probation cases, I omitted requesting an opinion on the following: When a probationer has been assessed with fine and costs, and has paid a part of same and his probation is revoked, and he is turned over to the State Department to serve his sentence, what disposition do I make of the money he has paid to me? For example, the probationer is assessed by the Court, with a fine of $50.00 and costs $75.00, total $125.00, and he pays $55.00 to me, then his probation is revoked and he is sent to serve his sentence, what disposition do I make of the $55.00? The State Department having already paid to me the costs in the case as per costs listed in Section 3667.

"My opinion is, since the probationer has been received by the State Convict Department the $55.00 should be remitted to that department, however, I would like to have your official opinion before acting in such cases."

In answer to your inquiry, it is my opinion that the money in question should be remitted to the Department of Corrections and Institutions.

The opinion of this office rendered to the State Comptroller on October 14, 1940, dealt with the situation where sentence was suspended and fine and/or costs later paid in compliance with the order of probation. Said opinion was distinguished from the opinions found in Biennial Report of Attorney General, 1928-1930, page 537, and Quarterly Report of Attorney General, Volume III, page 188, and other opinions holding to the same effect as those two opinions. The distinction was based on the fact that in the situations presented in the opinion to the State Comptroller, supra, there was no actual delivery of the convict to the Department of Corrections and Institutions. In the situation presented in your instant inquiry, there is an actual delivery to the Department of Corrections and Institutions, although said delivery may have been deferred. This being true, it is my judgment that the reasoning of the opinions found in Biennial Report of Attorney General, 1928-1930 and Quarterly Report of Attorney General, Volume III, above referred to, is applicable. It, therefore, follows that the monies which have been collected by you in said situation should be remitted to the Department of Corrections and Institutions.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1940.

Hon. J. F. Brawner, Director,
Drivers License Division,
Department of Public Safety,
Montgomery, Alabama.

Driver's License—Revocation—Probation—

When a person is convicted of any of the offenses for which revocation of his driver's license is mandatory, and such conviction

becomes final, the Director of Public Safety should forthwith revoke his driver's license, even though the execution of the sentence imposed upon such person has been suspended, and he has been placed on probation.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 25, 1940, in which you request my opinion as follows:

"I would appreciate it very much if at your convenience you would give me a ruling on the following question:

"Does the Director of the Department of Public Safety have the authority to revoke the driver's license of any person who has been tried and found guilty of violating any of the offenses covered under Section 10 of the Driver's License Law when the verdict of any court having jurisdiction over these cases includes placing all or part of the sentence imposed on probation."

Sub-section (h) of Section 10 of Act No. 181 H. 245 approved March 18, 1939 (General Acts, 1939, page 300), commonly known as the new Driver's License Law, or Highway Patrol Act, provides:

"The Director of Public Safety shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction of any of the following offenses, when such conviction has become final: 1. Manslaughter resulting from the operation of a motor vehicle; 2. Driving a motor vehicle by a person who is an habitual user of narcotic drugs or while intoxicated; 3. Any felony in the commission of which a motor vehicle is used; 4. Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident resulting in the death or personal injury of another; 5. Perjury or the making of a false affidavit or statement under oath to the Director of Public Safety under this Act or under any other law relating to the ownership or operation of motor vehicles; 6. Conviction, or forfeiture of bail not vacated, upon three charges of reckless driving, committed within a period of twelve (12) months."

When a person is convicted of any of the offenses set out in said Subsection, and such conviction has become final, and the Director of Public Safety receives a record of such conviction, in my opinion, he should forthwith revoke such person's driver's license, even though the record also shows that the execution of the sentence imposed upon such person has been suspended, and he has been placed on probation.

Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434), commonly known as the Probation Act, merely provides for the suspension of the execution of the sentence imposed, and the placing of the defendant on probation after he is **convicted.** Such procedure, that is, the sus-

pension of the execution of the sentence imposed, and the placing of the defendant on probation, does not affect the **conviction** in any way, or alter the fact that the person has been **convicted,** and it is the **conviction** on which revocation of the driver's license is based under Sub-section (h), supra.

It could not be said that the revocation of the driver's license is stayed by the suspension of the execution of the sentence imposed for the simple reason that revocation of the driver's license is not part of the sentence imposed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1940.

Hon. Albert J. Tully,
Attorney for the Personnel Board of Mobile County,
Mobile, Alabama.

Mobile County Civil Service Act—

Deputy Clerk of the Circuit Court of Mobile County appointed to serve as Clerk of the Civil Division of the Circuit Court, although authorized under the law to perform the official duties of the clerk of such Court, is not within the Unclassified Service for the reason that the Clerk of the Criminal Division of such Court is the "chief assistant" and the act authorizes only the **"chief assistant"** to come within the Unclassified Service (Act No. 470, H. 952, approved September 15, 1939, Local Acts, 1939, page 298).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of October 17, 1940, is as follows:

"At the request of Major Hal Pillans, Personnel Director of Mobile County, I wish to ask your official opinion as to the following matter:—

"Under the Laws of Alabama, the Clerk of the Circuit Clerk has the authority to appoint assistants, and to vest in such assistants the same powers and authorities as held by the Clerk. In Mobile County, under this provision of the Law, the Clerk of the Circuit Court has appointed a Deputy Clerk in charge of the Civil Division of the Circuit Court and another Deputy Clerk in charge of the Criminal Division of the Circuit Court. Both deputies have like powers, authorities and responsibilities, the only distinction between them being in the matter of salary.

"Section Two (2) of the Mobile Civil Service Act, (Act No. 470, H. 952, approved September 15, 1939, Local Acts 1939, page 298), provides that the following shall be in the unclassified service: —(2) 'Where by present Law official duties of any office mentioned in subdivision one of this Section are or may be performed by a chief assistant appointed by him, such chief assistant.'

"Under date of September 3rd, 1940, you rendered to the Honorable William A. Conrad, Clerk of the Circuit Court of Mobile County, Alabama, an opinion in which it was held that the Deputy Clerk of the Criminal Division comes within the 'unclassified service', as defined by the Mobile County Civil Service Act.

"Since the official duties of the Clerk of the Circuit Court may be performed either by the Deputy Clerk of the Criminal Division or by the Deputy Clerk of the Civil Division, we would like to present the question as to whether or not the Deputy Clerk of the Civil Division of the Circuit Court also comes within the 'unclassified service'."

It is my opinion that the Deputy Clerk of the Civil Division of the Circuit Court would not come within the Unclassified Service if the facts in existence at the time the opinion was rendered to Hon. Wm. A. Conrad, Clerk of the Circuit Court of Mobile County, Alabama, are still in existence. At that time, September 3, 1940, I was advised that the Deputy Clerk for the Criminal Division had been designated by the Clerk as "chief assistant", and in view of that information it was held that such Deputy Clerk of the Criminal Division came within the "Unclassified Service".—Quarterly Report of Attorney General, Vol. XX, page 239.

Section 2 of the Mobile County Civil Service Act (Act No. 470, H. 952, approved September 15, 1939, Local Acts, 1939, page 298) provides, as pertinent, as follows:

"Section II. UNCLASSIFIED SERVICE: The following shall be in the Unclassified Service: (1) Officials elected by popular vote and, in case of death, resignation, or removal, their legal substitute; (2) Where by present law official duties of any officer mentioned in subdivision One of this section are or may be performed by a chief assistant appointed by him, such chief assistant; *** ."

The Clerk of the Circuit Court of Mobile County is an officer elected by popular vote,—Constitution of Alabama, 1901, Section 165.

It is true that by Section 6723 of the Code of Alabama, 1923, clerks of the circuit court are invested with authority to appoint deputies with full power to transact all business of such clerks, and this is one of the tests provided under Section 2 of the Mobile County Civil Service Act for determining whether an employee is within the Unclassified Service. I cannot believe, however, that it was the intent of the Legislature, in providing as it did in Section 2 of the Act, that there could be more than one **"chief** assistant."

It is my opinion that the use of the word "chief" eliminates all doubt concerning the intent of the Legislature in this regard, for this word is incompatible with a theory which would lead to the conclusion that the Legislature intended to allow more than a singe **chief** assistant to each such officer. I reach this conclusion on the basis of the definition of the word "chief" as found in Words & Phrases under that head, and in Webster's New International Dictionary, Second Edition, Unabridged, wherein the word is defined as the "highest in office or rank; principal; capital". Both of these lexicographical authorities further define "chief" as being synonomous with "head, leading, main, prime".

Since, therefore, the Legislature has permitted only the **"chief** assistant" to come within the Unclassified Service, and since, according to the information already received from the Clerk of the Circuit Court of Mobile County, the Clerk of the Criminal Division of the Circuit Court has been appointed "chief assistant", you are therefore advised that the clerk of the Civil Division of the Circuit Court cannot come within the "Unclassified Service" because he cannot be "chief assistant".

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1940.

Hon. H. L. Hardin,
Sheriff Sumter County,
Livingston, Alabama.

Prisoners—Removal of to hospital when in ill health.

Where prisoner is removed to hospital, under order of the circuit judge, guard allowances are a proper charge against the county, but county is liable for medical services or hospitalization for the prisoner only in those instances where the prisoner is financially unable to provide the same for himself.

Sheriff not legally responsible for expenses incurred in hospitalizing prisoner under order of circuit court.

(Code of Alabama, 1923, Sections 4808, 4811)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 11, 1940, in which you request my official opinion as follows:

"I am the duly elected, qualified and acting sheriff of Sumter County, Alabama. A prisoner was confined in the jail of Sumter County, Alabama, who was ill. On the 8th day of October, 1940, Honorable Benj. F. Elmore, Judge of the Circuit Court of Sumter County, Alabama, entered an order, a copy of which is attached hereto and made a part hereof, wherein I was ordered to remove the prisoner from the said jail to a hospital at York, Alabama, and to place the necessary guards with him; the hospital to treat said prisoner. This order was entered by the court under and by virtue of Code Section 4811.

"I shall appreciate your rendering an opinion advising me who is responsible for the costs incurred, that is, for guards, medical service, hospitalization for prisoner during his confinement as a prisoner. I shall also appreciate your advising me whether or not I shall be liable personally for said expenses."

Your question relating to your liability for guard allowances is answered by the opinions reported in Quarterly Report of Attorney General, Volume X, page 106, and Quarterly Report of Attorney General, Volume XVI, page 32. These opinions hold that such guard allowances will be a proper charge against the county.

Your question regarding the County's liability for hospitalization and medical services is answered below.

Section 4811, Code of Alabama, 1923, under which the enclosed order of the Judge of the Seventeenth Judicial Circuit of Alabama was framed, provides as follows:

"Section 4811. Removal of prisoners in ill health.—When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail, and that fact, is made to appear clearly to any circuit judge, or to the judge of the county court of the county, such judge, must, by an order in writing, direct the sheriff or jailer to remove him to some suitable place, or hospital, as near as may be to the jail, and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail."

This section does not carry within itself a provision for payment of the expenses incurred in providing medical services or hospitalization for the prisoner. Nor does it place any duty upon the circuit judge in his order to ascertain whether or not the prisoner is financially responsible. The only obligation or duty imposed upon the circuit judge is to ascertain that the life or health of the prisoner who is confined in jail may be seriously endangered by longer confinement in jail. When this fact is ascertained, he may proceed to order that the sheriff remove such prisoner to a suitable place or hospital and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail.

I have found no statutory authority authorizing the county to pay hospitalization in such cases, other than Section 4808 of the Code of Alabama, 1923. This section provides as follows:

"4808. Necessary clothing, medicines, etc., to insolvent prisoners.—Necessary clothing and bedding must be furnished by the sheriff or jailer, at the expense of the county, to those prisoners who are unable to provide them for themselves; and also necessary medicines and medical attention to those who are sick, when they are unable to provide them for themselves."

The opinions of this office have limited the field of operation of Section 4808 to those cases where the prisoner is unable to provide such treatment for himself. See Biennial Report of Attorney General, 1930-32, page 3, and opinions therein cited.

The Supreme Court of Alabama in **Malone v. Escambia County,** 116 Ala. 214, 22 So. 503, seems to have similarly confined the operation of this section.

It therefore appears that if the prisoner in question is unable to provide such services for himself, the expense of the medical attention and hospitalization may be paid under Section 4808.

In this connection, it will be noted that Section 4808 does not designate the agency which is required to ascertain this highly important fact, i. e., whether the prisoner is able to provide these services for himself.

In my opinion, it is incumbent upon the county governing body, upon presentation of a claim for payment for services rendered, in the process of auditing and allowing such claim, to ascertain whether the prisoner was able to provide such services for himself. See Sections 224 and 225, Code of Alabama, 1923.

If, upon such examination, the county governing body determines that the prisoner could have provided such services for himself, then, of course, they have no authority to allow such claim, for Section 4811, standing alone, does not authorize the county to pay such expenses. This conclusion finds support in **Mitchell v. Tallapoosa County,** 30 Ala. 130, wherein the Supreme Court of Alabama, speaking through Chief Justice Rice, reached the conclusion that since the Code made no provision for the support of prisoners confined in jail, and no other provision of law was found fixing a liability on the county for medical attention, drugs and medicine furnished to any prisoner not at the request of the county or of the court of county commissioners, but at the request of a sheriff or jailer, the county was not responsible for medical attention, drugs and medicine so furnished.

Since we have found no statute fixing a liability on the county for medical attention or hospital bills furnished a prisoner who is able to provide these supplies and services for himself, it must necessarily follow, in view of the Mitchell case, supra, that there is no liability upon a county to pay for such services and supplies, even though the prisoner is confined in the hospital at the order of the circuit judge. See 44 A. L. R. 1286.

You are further advised that since you followed the order of the court, which appears on its face to be in complete accord with the provisions of the

statute, you will incur no personal liability. **Cf. Shelly v. Thomas,** 232 Ala. 222, 167 So. 319. See also Quarterly Report of Attorney General, Volume XV, pages 222, 247.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1940.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Tax Assessors—"Owner Unknown"—Tax Sales—Setting aside Tax Sales—Revenue Act of 1935—

1. A Tax Assessor is not authorized to assess property to "Owner Unknown" where the records in the office of the Judge of Probate discloses a record owner of such property.

2. Opinion appearing in Vol. XX, page 177 of the Quarterly Report Attorney General clarified.

3. There is no authority of law for the State Comptroller to set aside a tax sale, or cancel certificate of such sale where the property is bid in by the State, after he has made final settlement with the Tax Collector and has delivered certificates of such sales to the State Land Commissioner.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated October 17, 1940 follows:

"I respectfully request your official opinion on the following:

"1. Does a Tax Assessor have the authority to assess property to 'Owner Unknown' when the records in the office of the Judge of Probate discloses the record title owner of the property?

"In an opinion of August 26, 1940, you held in the syllabus to the opinion that a Tax Assessor was not authorized to assess property to 'Owner Unknown' if by examination of the records in the office of the Judge of Probate he might ascertain the record title owner thereof. However, in the body of the opinion you held: 'I am of the opinion that an assessment of property to 'Owner Unknown' is void, and that a sale based upon such assessment is likewise void, if the Tax Assessor

making such assessment, by examination of the deed records in the office of the Judge of Probate, or by such inquiry as would suggest itself to a diligent and prudent man, can, before making the assessment, ascertain the name of the true owner of the property so assessed.'

"The word 'or' appearing in the body of the opinion has caused some confusion as to the exact meaning of the word as used and I will appreciate it if you will clear up this particular point.

"2. If your answer to question No. 1 is in the negative, am I, as State Comptroller, authorized to cancel such sales from the records of the State Land Commissioner **for prior years** where the Tax Collector has settled with the State Comptroller and the State Comptroller has delivered to the State Land Commissioner all certificates of lands bid in for the State which have been accepted by him?

"In connection with my inquiry No. 2, I call your attention to an opinion rendered by your office to Hon. Matt Boykin, Judge of Probate, Mobile County, dated January 31, 1940, Quarterly Report of the Attorney General, Volume 18, page 144, and an opinion rendered to Hon. I. C. Heck, State Comptroller, dated August 26, 1940.

"3. We have a great number of sales of property for taxes to the state which are in error, due to the fact that the properties have been double assessed. Practically all of these errors show up after the Tax Collector has settled with the State Comptroller and the State Comptroller has delivered to the State Land Commissioner certificates on said sales. Please advise if the State Comptroller is authorized to cancel such sales from the records of the State Land Commissioner, for the current or prior years, and charge the official making the error with the advertising fee in the sale."

Your first inquiry has been answered in the negative by this office in an opinion addressed to you under date of August 26, 1940. This opinion has now been printed in the Quarterly Report of the Attorney General and appears on page 177 of Vol. XX.

You asked that I clarify the language used in the above referred to opinion wherein I held:

"I am of the opinion that an assessment of the property to 'Owner Unknown' is void, and that a sale based upon such assessment is likewise void, if the Tax Assessor making such assessment, by examination of the deed records in the office of the Judge of Probate, or by such other inquiry as would suggest itself to a diligent and prudent man, can, before making the assessment, ascertain the name of the true owner of the property assessed."

It appears from your request that the word "or" used in the above excerpt from the opinion under date of August 16, supra, is causing some confusion. It is contended that by the use of the word "or" in said opinion, that the Tax Assessor could determine in the alternative who, if anyone,

was the owner of the property in question. In other words, the Tax Assessor could search the records in the office of the Judge of Probate in order to ascertain the owner of the property, or in the alternative he could make such other inquiry as would suggest itself to a diligent and prudent man.

This was not the meaning of the word "or" as used in said opinion. The meaning of the language used in the opinion is that the Tax Assessor should **first** search the records in the office of the Judge of Probate in an effort to ascertain the owner of the property in question, and if he fails to find a record owner of the property, he should then make such other inquiry as would suggest itself to a diligent and prudent man. I do not see how any other construction could be placed on the language used in this opinion. It appears to me that a diligent and prudent inquiry could not be made if the records in the office of the Judge of Probate were not searched in an effort to ascertain the owner of the property,—and this should be the first thing that would suggest itself to a diligent and prudent man.

The opinion under date of August 16, 1940, is hereby modified and extended to conform to the above.

My answer to your second inquiry is in the negative.

In answering this question, I am not unmindful of the above referred to opinion rendered to you under date of August 16, 1940. However, I did not construe the question propounded in your former request to include sales made in prior years, where the Comptroller had made final settlement with the Tax Collector and had delivered the certificates of sale to the Land Commissioner. On the contrary, I construed this question to include only those tax sales for the current year which were before the Comptroller on final settlement, such settlement having not been made, and the certificates of sale having not been delivered to the Land Commissioner. This is evidenced by the fact that I cited as authority for my holding in the opinion rendered on August 16 the opinion appearing in Vol. XVIII, page 144, of the Quarterly Report of the Attorney General, wherein it was held: That the Comptroller had no authority to set aside tax sales under the provisions of Section 232 of the Revenue Act of 1935 where final settlement had been made with the Tax Collector, and the certificates of sale had been delivered by the Comptroller to the State Land Commissioner.

You are therefore advised that in my opinion where the Comptroller has made final settlement with the Tax Collector and has delivered the certificates of sale to the State Land Commissioner, Section 232 of the Revenue Act of 1935 has no application, and such tax sales for prior years cannot thereafter be set aside by the Comptroller. See Quarterly Report, Attorney General, Vol. XVIII, page 144.

The premises considered, it is my opinion that the only recourse to have such sale set aside as being void for want of regularity is by proper court procedure, or in the alternative, if the Governor is satisfied from all of the surrounding circumstances that the State had no claim or title to such land, he may execute a quitclaim deed as provided by Section 6851 of the Code of 1923, as amended.

Based on the opinion appearing in Vol. XVIII, supra, my answer to your third inquiry is in the negative.

In my opinion, it is immaterial that the tax sales considered in this question were irregular due to double assessments. The same rule as stated in answer to your request number two would be applicable to the sales here considered.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1940.

Hon. H. C. Hayes,
County Solicitor,
Jackson County,
Scottsboro, Alabama.

Statutes—General Acts, 1939, page 866—Justices of the Peace—

Justice of the peace does not have final jurisdiction of violations of General Acts, 1939, page 866, but does have preliminary jurisdiction.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your request for official opinion as follows:

"An employee of the State Department of Agriculture reported a violation of the provisions of Senate Bill No. 268, Acts of 1939, approved by the Governor September 21, 1939, pertaining to persons engaged in entomological, pathological, horticultural and floricultural work. As you know, there is a void in our County Court due to the conflicting sections of the recent bill creating the Jackson County Court, and we would like to know whether or not a Justice of the Peace would have jurisdiction of violations of this Act."

In answer to your inquiry, I call your attention to Section 7 of Act No. 548, S. 268, approved September 21, 1939 (General Acts, 1939, page 866), which provides:

"Section 7. That any person violating any of the provisions of this Act or the rules and regulations made by the State Board of Agriculture and Industries pursuant thereto shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than six months, or by both fine and imprisonment at the discretion of the court having jurisdiction."

Section 3846 of the Code of Alabama, 1923, provides:

"3846. Territorial jurisdiction of justices of the peace in criminal matters.—Justices of the peace and notaries public ex-officio justices of the peace shall have final jurisdiction in criminal cases as provided in the following section in the respective precincts for which they are selected or appointed, and shall have and exercise such jurisdiction as to all matters arising in adjoining precincts in which there is no justice of the peace or notary public ex-officio justice of the peace, or when the justice of the peace or notary public ex-officio justice of the peace is disqualified or incompetent to act; but they shall have jurisdiction as to all preliminary hearings co-extensive with their counties except in the precincts in which or for which inferior courts have been established in lieu of justice of the peace, and the jurisdiction of justice of the peace conferred on such inferior courts."

Your attention is further called to Sections 38 and 42 of Act No. 647, S. 379, approved July 10, 1940 (creating the Jackson County Court), which provide:

"Section 38. That the County Court of Jackson County shall from and after the passage of this Act no longer exist and no officers of this state shall collect any fees or salary because of said court or for services rendered in said County Court or for services rendered in said Court, and all cases pending in said County Court of Jackson County when this act becomes a law, shall immediately, become pending upon the docket of the Jackson County Court as though originally brought in said Court, and shall be called for trial on the first Monday in the month following the approval of this Act at which time any defendant whose case has been pending in said County Court may demand a trial by jury."

"Section 42. This act shall become effective immediately upon its passage and approval by the Governor, or its otherwise becoming a law, except that the court herein created shall not begin to function as herein provided until the second Tuesday after the first Monday in January in the year 1941, and no person shall assume the office of judge of said court until such date."

It will be noted that under the provisions of Section 7 of Act No. 548, supra, final jurisdiction is not conferred on justice of the peace courts to try cases for violating the provisions of the act. Hence, in the absence of such authority, the justice of the peace would have only preliminary jurisdiction of the offense as provided by Section 3846 of the Code, supra. **Pharr v. Whittle,** 237 Ala. 124, 185 So. 895. The procedure to be followed in such preliminary proceedings is provided under Sections 5217-5248 of the Code of 1923.

In the case of **State v. Bush,** 12 Ala. App. 309, 68 So. 492, the court held:

"The warrant authorized by Section 7588 (now Section 5221) which prescribes its form is to be returnable before the justice of the peace, and if the defendant, when arrested, does not elect to give bail without preliminary trial, as provided in Sections 7589 and 7590 (now Sections 5222 and 5223), he is entitled to a preliminary hearing before the justice. —Code Sections 7593-7615 (now Code Sections 5226-5248). This is one

of the rights protected by the Constitution and the act of the justice in making the warrant returnable to the Circuit Court in Houston County was an arbitrary exercise of authority without the scope of his jurisdiction, a violation of the petitioner's constitutional rights, and the warrant was therefore void.—Jones v. State, 168 Ala. 107, 53 So. 286."

Due to the fact that the former County Court of Jackson County no longer exists and that the County Court created by Act No. 647, supra, is not authorized to function until the second Tuesday after the first Monday in January in the year 1941, it is my opinion that a warrant could be issued by a justice of the peace for a violation of the provisions of Act No. 548, supra, returnable to the justice of the peace, but that said justice of the peace would not have final jurisdiction in the matter, but would have only preliminary jurisdiction of violations of Act No. 548, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 28, 1940.

Hon. Wm. J. Kern, Clerk,
Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

Highway Patrol Officers—Alabama Alcoholic Beverage Control Board Officers—

Fees accruing to Highway Patrol officers should be covered into the Highway Patrol Funds, regardless of the fact that such Highway Patrol officers are also agents of the Alabama Alcoholic Beverage Control Board.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion dated September 23, 1940, follows:

"I am grateful to you for your opinion of September 12th., 1940, respecting Fees of A. B. C. B. officers of the State of Alabama on warrants issued from the Inferior Criminal Court of Mobile County. However, I feel compelled to write you again requesting your opinion as to:—

"Since the A. B. C. B. officers working in Mobile County on Search and Arresting Warrants issued from this Court are commissioned as Alabama Highway Patrol officers, should such fees accruing therefrom and collected by this Court be paid to the Treasurer of the State of Alabama for the use of the Alabama Highway Patrol Department, as are

the Fines and Fees accruing from arrests made by regular Alabama Highway Patrol officers?"

Section 13 of Act No. 181, H. 245, approved March 18, 1939 (General Acts, 1939, page 300), provides in part as follows:

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" *** provided, however, that no State Highway Patrol Officer shall be entitled to any costs, fees or mileage for attending any courts, but instead, the proper authorities shall collect such costs, fees and mileage that are due such officers for attendance on any court or for any official act and promptly turn the same over to the Director of Public Safety who shall cover the same into the Highway Patrol Fund, and it shall become a part thereof *** ."

It is a well-known rule of statutory construction that where a statute is plain and unambiguous there is no room for construction. **State v. Praetorians,** 146 So. 411, 226 Ala. 259; Alabama Digest, Statutes, Key No. 190.

Therefore, it is my opinion that all fees accruing to agents of the Alabama Alcoholic Beverage Control Board while acting in their official capacity as commissioned Highway Patrol Officers are to be paid into the Highway Patrol Fund, inasmuch as this office has heretofore held that fees accruing to commissioned Highway Patrol Officers are to be paid into said fund. Quarterly Report of Attorney General, Vol. XIX, page 74.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1940.

Hon. J. C. McPherson,
Deputy Superintendent,
Bureau of Insurance,
Montgomery, Alabama.

Credit Unions—Usury—Superintendent of Insurance—

The question as to whether or not a service charge may be imposed by a credit union, opearting under provisions of Act No. 597, S. 114, approved September 7, 1927 (General Acts 1927, page 696), depends on the facts in each case.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 23, 1940, in which you request my opinion as follows:

"Senate Bill No. 114 approved September 7, 1927, dealing with Credit Unions operating in this State provides in Section 9-A of said Act that the Directors and Officers of the Credit Union may determine the rates on loans and on deposits provided that such loans will be at reasonable rates of interest, which shall not exceed one percent per month on unpaid balances.

"The Bureau of Insurance has been called upon by a Credit Union to rule as to whether or not the Credit Union can make a service charge in addition to the regular rate of interest of one percent on an unpaid balance.

"Superintendent of Insurance from approving a reasonable service charge in addition to the interest rate of one percent."

Section 9 of Act No. 597, S. 114, approved September 7, 1927 (General Acts, 1927, page 696), which is the law under which credit unions in this state operate, is as follows:

"Section 9. Directors, Officers, Rates: At the first meeting the Directors shall elect from their own number a President, Vice-President, Secretary and Treasurer of whom the last two named may be the same individual. It shall be the duty of the Directors to have general management of the affairs of the credit union, particularly: (a) To act on application for membership. (b) To determine interest rates on loans and on deposits, provided that such loans shall be at reasonable rates of interest which shall not exceed 1% per month on unpaid balances. *** "

The facts presented in your inquiry are not sufficient, in my opinion, to authorize a definite answer to your question. Unquestionably, if the service charge which the credit union seeks to collect is in the nature of interest, then it would be illegal, but on the other hand, if the service charge is to be collected for some actual service rendered to the borrower, then, in my opinion, it could be legally collected.

There are many cases wherein the courts have considered the question as to whether or not a service charge exacted over and above the maximum rate of interest allowable under the statute, constitutes usury The decisions are all predicated on the facts in each individual case. I call your attention to the following statement found in 66 Corpus Juris 230:

"A lender may properly exact from a borrower, in addition to interest at the highest lawful rate upon the money lent, reasonable fees or compensation for services rendered, or reimbursement of expenses incurred, in good faith, by the lender or his agent, in connection with the loan, without thereby rendering the transaction usurious, even though the services rendered or acts done be such as would ordinarily be performed by the lender in his own interests. A lender will not, however, be permitted to cloak usurious exactions beneath charges for pretended services or expenses, and a bonus or premium for a loan is no less usurious because stated to be by way of compensation for services, where no services are rendered. The items of service or expenses for which a charge may be made are those only which are incidental to the loan, and a lender

may not, as a means of extracting additional interest or profits, charge the borrower for expenses which are not incidental to the loan. The test of the character of such a charge, as usury vel non, is the reasonableness of the amount and the intent of the parties."

Alabama has recognized this rule in the cases of **Kinney v. Pollak,** 223 Ala. 654, 142 So. 390, 225 Ala. 229, and **Dudley v. Colonial Lumber Company,** 137 So. 429, 223 Ala. 533.

I also wish to refer you to a decision of the Court of Appeals in the case of **Willis v. Buchman** (MS), which was decided by the Court of Appeals, but which decision was not considered by the Supreme Court on petition for writ of certiorari to that court, in view of the fact that the appellant was considered by the Supreme Court to have theretofore dismissed his appeal. In the opinion of the Court of Appeals appears the following language:

"Interest is compensation for the use of money lent. Whatever thing of benefit comes to the lender as compensation for the use of money is interest, no matter what name it may be given or what expedients may be adopted to conceal the fact that the benefit received is, in essence, compensation for the use of the money. No matter how remote a collateral transaction may seem to be, no matter how shrewdly it is made to appear that a payment to the lender is for something else, **if the facts, taken together and read in the light of human experience, justify a natural inference that the lender received the benefit because the borrower had the use of his money and as compensation for the use, the benefit is interest.** As such it must be added to all similar benefits to determine whether the aggregate exceeds the rate of compensation which the lender is permitted to receive."

In view of the authorities above referred to, it is my opinion that the determining factor in the matter under consideration is one of fact. It appears to me that if, after an investigation, you determine that the service charge is sought to be collected for a legitimate service to be rendered the borrower, then you would be within the law in authorizing its collection. However, if on the other hand, your investigation shows that the service charge is a mere subterfuge for the purpose of collecting an additional amount of interest, then you should not authorize the collection of such charge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 29, 1940.

Hon. Roger Snyder,
Member, House of Representatives,
211-12 Title Guarantee Building,
Birmingham, Alabama.

Milk Control Board—Merit System Act—

Employees of the State Milk Control Board held subject to jurisdiction of State Merit System Act, Act No. 58, S. 44, approved March 2, 1939 (General Acts, 1939, page 68).

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion bearing date of October 17, 1940, is as follows:

"I would like it, if I can get your opinion as to whether the employees of the State Milk Control Board come under the jurisdiction of the Civil Service Board.

"Section 4, page 270 of the General Laws of Alabama for 1939 reads, 'All such employees, assistants and legal representatives and counsel shall serve at the will of the Milk Control Board and may be removed by it at any time.'"

In reply, I wish to advise that in my opinion the employees of the State Milk Control Board are subject to the jurisdiction of the Personnel Board of the State of Alabama, as provided for by Act No. 58, S. 44, approved March 2, 1939 (General Acts, 1939, page 68). You will note that Act No. 164, H. 118, approved March 20, 1939 (General Acts, 1939, page 267), provides in Section 4 in part as follows:

"The Milk Control Board may employ such employees, assistants and legal representative and counsel as it may deem necessary to carry out the provisions of this Act, and may authorize and fix their respective salaries, wages or compensation, and such employees shall be paid subsistence and necessary traveling expenses at the rate allowed other State employees. All such employees, assistants and legal representatives and counsel shall serve at the will of the Milk Control Board and may be removed by it at any time, but all expenditures made under authority of this Act shall and must be paid from the receipts hereinafter provided for."

Section 38 of the said Act No. 164, H. 118, approved March 20, 1939, provides as follows:

"Section 28. This Act shall take effect and be in full force immediately upon its passage and approval, and all other Acts or Statutes in

conflict herewith, including an Act of the Legislature, known as House Bill 311—Hamner, passed at the regular session of the Legislature of 1935, and approved July 9, 1935, are hereby expressly repealed, effective immediately upon approval by the Governor of this Act."

If no other legislation appeared to prevent, it would seem that the general rule that "the last expression of the Legislature is the law" might well apply to the circumstances outlined above, and the effect of the said Section 28, quoted supra, would necessarily remove the employees of the Milk Control Board from the influence of the Merit System Law cited, supra. This situation is necessarily prevented, however, by the pertinent provisions of Act No. 552, S. 338, approved September 19, 1939 (General Acts, 1939, page 872), which are as follows:

"Section 1. That all provisions of the Merit System Act, approved March 2, 1939, shall be applicable to all of the State Officers and employees covered thereby at the time of its enactment, any other statutes or provisions of law subsequently enacted to the contrary notwithstanding."

"Section 2. That all laws and parts of laws, general, special, or local, in conflict with the provisions of this Act are hereby repealed."

Premises considered, it is my opinion that the employees of the Milk Control Board are subject to the provisions of the Merit System Act cited, supra, and your question must be answered in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1940.

Hon. William F. Black, Director,
Bureau of Transportation,
Alabama Public Service Commission,
Montgomery, Alabama.

Alabama Motor Carrier Act construed—Motor Carriers—

Fee of $1.00 held not required to be paid for issuance of distinguishing plate or tag issued by Alabama Public Service Commission under provisions of subsection E of Section 30 of Act No. 669, H. 792, approved July 5, 1940, when issued to motor carrier to whom the Alabama Public Service Commission had issued a distinguishing plate or tag under laws in effect prior to the effective date of Act No. 669, supra.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion under date of October 18, 1940, is as follows:

"Paragraph E, Section 3, of Act approved July 5, 1940, known as the Alabama Motor Act of 1939, sets forth, among other things, that the Alabama Public Service Commission is to prescribe a distinguishing plate to be displayed on each vehicle operated on the highways of this state, under the provisions of the said Act and such reasonable rules and regulations as the Commission may adopt.

"It is further provided that 'One such registration or distinguishing plate or tag as provided for by this section shall be issued for each distinguishing plate or identification tag previously issued by the Commission and properly in use by motor carriers holding certificate of public convenience and necessity issued by the commission or permits theretofore issued.'

"The Commission request a ruling from you as to whether replacing distinguishing plates, under the above quoted provision of Alabama Motor Carrier Act of 1939, are to be issued without charge or must they be issued only upon the payment of the registration fee of $1.00 prescribed.

"The Commission is ready to proceed with the issuance of new type distinguishing plates to certain carriers entitled thereto, and will appreciate an early ruling by you on this matter of registration fee on vehicles already qualified."

Subsection E of Sectoin 30 of Act No. 669, H. 792, approved July 5, 1940, provides as follows:

"E. For every motor vehicle to be used by a motor carrier on the highway of the State of Alabama there shall be paid a registration fee in the amount of One Dollar, and the Commission is given authority to adopt reasonable rules and regulations for the issuance of an appropriate or distinguishing plate or tag for each such motor vehicle upon whcih the registration fee prescribed by this Act shall have been paid, and such registration or distinguishing pate or tag shall remain with the motor vehicle for which it was issued and shall not be transferable. It shall be unlawful for any motor vehicle to be operated on the highways of this State without having conspicuously displayed on the front or rear thereof a registration or distinguishing plate or tag duly prescribed and issued for such vehicle by the Commission under the provisions of this Act, **provided however that one such registration or distinguishing plate or tag as provided for by this section shall be issued for each distinguishing plate or identification tag previously issued by the Commission and properly in use by motor carriers holding certificates or (sic) public convenience** and necessity issued by the Commission or permits theretofore issued, under such reasonable rules and regulations as the Commission may prescribe, but no plate or tag previously issued will be replaced under this proviso until it is determined by the Commission that the carrier holding such plate or tag previously issued is entitled to a certificate

or permit under this Act, and pending such determination the use of any such plate or tag previously issued and properly in use on the effective date of this Act, shall be lawful. If in any proceeding in which a motor carrier operating on the effective date of this Act, or prior thereto is seeking a certificate or permit thereunder, it is found that the applicant is not entitled to such certificate or permit and application therefor is denied them in that event, any and all distinguishing plates or identification tags previously issued to such carrier shall be void."

It is my opinion that motor carriers holding a certificate of public convencience and necessity or a permit issued by the Alabama Public Service Commission prior to the effective date of Act No. 669, supra, may obtain one registration or distinguishing plate as required by said Act No. 669, supra, without the payment of the $1.00 registration fee, for each registration or distinguishing plate issued by the said Commission to such carriers prior to the effective date of Act No. 669, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1940.

Hon. C. E. McNatt, Clerk,
Circuit Court, Franklin County,
Russellville, Alabama.

Costs and Fees—Clerks of Circuit Courts—Department of Corrections and Institutions—Probation—

Where one is convicted of a felony and sentence is suspended, one of the conditions of probation being that costs be paid in installments, the Clerk of the Circuit Court should not make remittances of the amounts so collected until all of said costs due are paid, unless the order of probation is changed to some other definite procedure. The clerk is entitled to 5% commission on the costs so collected and remitted.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 26, 1940, in which you request my official opinion as follows:

"A defendant is convicted of a felony charge in the circuit court of Franklin County and is sentenced to serve a term in the penitentiary and the sentence is suspended and the defendant placed on probation and one of the conditions of the probation order is that the defendant pay the court costs by making monthly payments of $5.00 per month.

"The state department of corrections and institutions had the comptroller of the state to immediately issue a state warrant to me as clerk of said court in full payment of the court costs and upon receipt of said warrant from the state I disbursed said costs as provided by law. The defendant is paying the costs in payments of $5.00 per month and as I understand the law, it is my duty to pay this $5.00 per month to the state treasurer for the use of the department of corrections and institutions. Should I immediately mail each $5.00 payment on costs received from the defendant to the State treasurer or should I hold each $5.00 payment until all of the costs are paid by the defendant and mail it all to the state treasurer at one time? Am I as clerk of the circuit court entitled to five per cent commission for collecting this costs from the defendant and disbursing it to the state treasurer? Please let me have your opinion."

In answer to the first part of your inquiry it is my opinion that the distribution of the costs collected should not be made until all of said cost due is collected, unless the order of probation is changed to some other definite mode of procedure to be followed This answer to your inquiry is true of nenecessity. Three possible situations might arise under the circumstances set out in your inquiry. These three situations will be below discussed, together with the proper mode of procedure to be followed in each situation.

First: The terms of probation may be carried out in full. In this instance the distribution of the costs collected should be as follows:

1. Trial tax should be paid in full.

2. The monies collected for costs which are earmarked for a particular fund or department, such as solicitor's fee, stenographer's fee, which have not theretofore been paid from any source, should be remitted to the particular fund or department for which earmarked.

3. The monies collected for costs, which have theretofore been paid by the Department of Corrections and Institutions, under Section 3667 of the Code, should be remitted to that Department.

4. The monies collected for costs, which have theretofore been paid out of the Fine and Forfeiture Fund, or its equivalent, should be remitted to that fund.

5. The monies collected for particular officers and witnesses which have not theretofore been paid either by the Department of Corrections and Institutions or out of the Fine and Forfeiture Fund, or its equivalent, should be remitted to the proper officers and witnesses entitled thereto.

See opinion of the Attorney General rendered to Hon. B. P. Singleton, Chief Examiner of Public Accounts, on October 14, 1940 (copy enclosed).

Second: The terms of probation may be revoked for a non-compliance therewith and the probationer sent to the penitentiary. In this situation,

whatever costs have been collected should be remitted in toto to the Department of Corrections and Institutions.—See opinion of the Attorney General to Hon. H. M. Hughes, Clerk of the Circuit Court of Madison County, Alabama, under date of October 25, 1940 (copy enclosed).

Third: After paying part of said costs the court might extend the order of probation to relieve the probationer of paying the balance due. In this situation the costs so collected should be distributed as follows in the absence of any specific order of the court as to what distribution of said costs so collected should be made:

1. The trial tax should be paid in full.

2. There should be an equal proration of the items of cost (exclusive of trial tax) in proration to the amounts taxed and the amounts collected. For example, if the total amount of costs taxed (exclusive of trial tax) amounts to $100.00 and only $50.00 is collected, the Department of Corrections and Institutions should receive fifty percent of the amounts paid by it under Section 3667 of the Code of Alabama, 1923, less five percent commission allowed to the clerk for collecting and remitting same. The other funds or individuals to which the money should be paid, should be paid on the same pro rata basis.

See opinion of the Attorney General to Hon. H. M. Hughes, Clerk of the Circuit Court of Madison County, Alabama, on October 23, 1940 (copy enclosed).

Although the opinions above cited deal with situations where there is a sentence to hard labor for the payment of fine and costs which sentence is suspended, nevertheless the principles therein enumerated are equally applicable to felony cases, where a condition of probation is that the costs be paid, insofar as said opinions deal with the collection and proper distribution of costs.

In answer to the second part of your inquiry, it is my judgment that you would be entitled to five per cent commission on the costs in question so collected and remitted to the proper departments or funds entitled thereto. (See opinions of the Attorney General, supra.)

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1940.

Hon. D. M. Weakley, Superintendent,
Alabama Boys Industrial School,
Birmingham, Alabama.

Alabama Boys Industrial School—Sheriffs—Guard Fees—Sheriff's Feed Bill—

1. Sheriff's feed bill for feeding escaped inmates of Alabama Boys Industrial School held payable by the said school.

2. Sheriff's guard fees for guarding escaped inmates held in jail for return to Alabama Boys Industrial School held not authorized by law and not payable by Alabama Boys Industrial School.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion under date of October 10, 1940, is as follows:

"Sometimes boys run away from this School and they are caught and placed in jail awaiting return to the School.

"Please advise me if in your opinion when boys are held in jail can we legally pay for their board and Turn Key fee in and out for the time they are held in custody."

In reply I wish to advise that it is my opinion that the Alabama Boys Industrial School may pay the Sheriff's feed bill incurred while holding for return boys who have escaped from the Alabama Boys Industrial School.

It is further my opinion, however, that the Sheriff is without authority of law to charge a guard or "turnkey" fee for committing such boys to jail, and the Alabama Boys Industrial School is without authority to pay said guard fee.

Sections 689 through 708, inclusive, of the School Code of 1927 provides for the establishment, maintenance and conduct of the Alabama Boys Industrial School. Under these provisions of law it is specifically provided that boys committed to the school shall be in the care and custody of such school. The maintenance of the boys in the said school becomes a duty of the school itself under the provisions of the above cited law.

It is my opinion that the Sheriff's feed bill may be paid by the school as a part of the maintenance of the inmate of the school, who is held for return to the school officials.

The validity of the charge for guarding prisoners or the "turnkey" fee charged by the Sheriff is conditioned upon the circumstances outlined in Section 3741 of the Code of Alabama, 1923, as follows:

"For guarding each prisoner lawfully committed to jail in the following cases:

In all felony cases whether convicted or not $2.00

In all arrests under indictment, whether convicted or not $2.00

In all other cases where convictions follow arrest ..... $2.00"

You will note that the allowance of all guard fees or "turnkey fees" of Sheriffs are allowed for guarding **prisoners** lawfully committed to jail. Section 689 of the School Code of 1927 provides in the last sentence thereof as follows:

> "Nothing in this chapter contained shall be construed to classify this school as a penal institution."

In my judgment the inmates of the Boys Industrial School are not prisoners since the institution is not a penal institution. Cf. Quarterly Report of Attorney General, Volume XVI, page 126. No authority of law, therefore, can be pointed to for the guard fee charged by the Sheriff under the facts outlined in your request. When no law authorizes a fee, an officer may not claim such fee. Section 7255 of the Code of Alabama, 1923, provides:

> "7255. **No fee charged unless expressly authorized.**—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

The premises considered, it is my opinion that the feed bill as outlined in your request, may be paid by the Alabama Boys Industrial School, but no authority of law exists for the payment of the guard or "turnkey" fee to the Sheriff for holding escaped boys for return to the Alabama Boys Industrial School.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1940.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

County Officials—Approving Bonds—

1. Bonds of Constables, Justices of the Peace and Notaries Public Ex Officio Justice of the Peace should be approved by the Court of County Commissioners.

2. Fee for filing and recording each official bond should be collected by the Probate Judge.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

Your request for official opinion dated October 23, 1940, follows:

"Please refer to your opinion to the Hon. S. P. Poyner, Judge of Probate, Houston County, dated July 12, 1940, (Vol. XX, page 56), wherein you ruled that the bonds of notaries public should be approved by the court of county commissioners rather than the Judge of Probate, and advise me if the bonds of constables, justices of the peace and notaries public ex-officio justices of the peace should be approved by the court of county commissioners. Also, please advise me if the fees should be collected by this office or by the court of county commissioners.

"I would thank you to let me have your opinion in this matter at your earliest convenience, as the newly elected officials will present their bonds for approval shortly after the general election."

Section 3 of Act No. 191, H. 344, approved April 20, 1933 (General Acts 1933, page 203), reads as follows:

"Section 3. The Court of County Commissioners, Boards of Revenue or other like governing bodies of the respective counties are hereby authorized and empowered to fix and approve the official bonds of all other county officials and employees, and clerks, deputies and employees in county offices in such an amount or amounts as may in their judgment be necessary for the safety and security of public funds or other funds and as the public interest may demand subject to such limitations as are specifically provided herein and made applicable to each particular county official."

Following this Section, Act No. 191 sets out in the succeeding Sections the amounts of the official bonds of the various officials of the county. Section 14 thereof reads as follows:

"Section 14. The official bonds of Justices of the Peace, notaries Public and Ex-Officio Justices of the Peace, Notaries Public, Constables and County Surveyors shall be, as to each officer, in the sum of $1,000.00 the premiums on said bonds to be paid by the person making such bond and without expense to the County."

From a reading of the above Sections it appears that the bonds of Justices of the Peace, Constables, and Notaries Public Ex-Officio Justices of the Peace are to be approved by the Court of County Commissioners.

The reasoning in our opinion to Hon. S. P. Poyner, Judge of Probate, Houston County, under date of July 12, 1940, (Quarterly Report Attorney General, Vol. XX, page 56) holding Notaries Public were required to file a bond under the Bains Act (Act No. 191, supra), and to have such bond approved by the Court of County Commissioners, is particularly applicable to Constables, Justices of the Peace and Notaries Public Ex-Officio Justices of the Peace.

It is my opinion, therefore, that Constables, Justices of the Peace and Notaries Public Ex-Officio Justices of the Peace must give a bond in the sum of $1,000.00, such bond to be approved by the Court of County Commissioners as is provided in the Bains Act.

Your second inquiry in regard to the collection of fees presents a new question for consideration.

Section 22 of the Bains Act reads as follows:

> "Section 22. That the bonds herein provided to be made shall be conditioned as now provided by law, and shall in all respects be subject to and governed by the provisions of law governing, regulating, concerning and pertaining to official bonds except as may be in conflict with provisions of this Act."

From this Section it is seen that all provisions of law applicable to the making of bonds of county officials not in conflict with any of the provisions of the Bains Act are still in force.

Section 21 of the Bains Act reads as follows:

> "Section 21. That the bonds of all county officers and county employees as referred to in this Act, with the exception of the bond of the Judge of Probate, shall be filed and recorded in the office of the Judge of Probate, and the bond of the Judge of Probate shall be filed and recorded in the office of the Clerk of the Circuit Court, and certified copies of the bonds of the Probate Judge and Tax Assessor and Tax Collector shall be filed with the State Comptroller."

It is seen, therefore, that the Judge of Probate is still charged with the duty of filing and recording the bonds of the county officials even though he has been relieved of the duty of approving such bonds. In Section 7285 of the Code of Alabama, 1923, a fee of $1.00 is provided for the Probate Judge for approving, filing and recording each official bond.

Though the Bains Act has relieved the Probate Judge of the duty of approving the bonds of certain county officials, it has specifically charged him with the duty of filing and recording each such official bond. Furthermore, it has provided that the laws pertaining to official bonds are still to be in effect except where they are in conflict with the provisions of the said Act. Therefore, it is my opinion that the Judge of Probate should collect the fee of $1.00 for filing and recording each official bond, even though such bond has been approved by the Court of County Commissioners.

The conclusion last hereinabove reached is in accordance with the conclusion reached in an opinion rendered to Hon. B. P. Singleton under date of June 10, 1940 (Quarterly Report Attorney General, Vol. XIX, page 242), wherein it was held that the Probate Judge was entitled to this fee for recording the bonds of the County Superintendent of Education and the Custodian of School Funds, even though such bonds are approved by the City Board of Education.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1940.

Hon. Roy Johnson,
Hon. Harry E. Smith,
Hon. Cecil M. Deason,
Jefferson County Election Commission,
Birmingham, Alabama.

Jefferson County Civil Service Act—

1. Employee in Classified Service may serve as election official in general election.

Opinion by Assistant Attorney General Loeb.

Gentlemen:

Your request for an official opinion under date of October 23, 1940, is as follows:

"We, the members of the Election Commission of Jefferson County, wish to know as quickly as possible the answer to the following questions:

"We have an opinion from the Attorney for the Civil Service Board, Hon. Frank Bainbridge, which states that any employee coming under the Civil Service classification in Jefferson County is prohibited from serving in any capacity in any election. We would like your opinion on this ruling.

"We particularly call your attention to Sec. 30 of the Jefferson County Civil Service Act as amended by No. 182 (House Bill No. 383, approved March 17, 1939):

"'Sec. 30. POLITICAL ACTIVITIES PROHIBITED. (a) No person shall be appointed or promoted to, or demoted or dismissed from any position, or in any way favored or discriminated against with respect to employment because of his political or religious opinions or affiliations or his race. (b) No person shall seek or attempt to use any political endorsement in connection with any appointment to a position. (c) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration. (d) No employee and no member of the Board shall, directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take any part in soliciting any such assessment, subscription, or contribution. No person shall solicit any such assessment, subscription, or contribution of any employee. (e) No employee shall be a member of any national, state, or local committee of any political party, or an officer of a partisan political club, or a

candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote. (f) Any officer or employee under the jurisdiction of this Act who violates any of the foregoing provisions of this section shall forfeit his office or position.'

"As the election is Nov. 5, a prompt ruling will be appreciated."

In answering your inquiry, I shall confine myself to a discussion of the right of an employee working under the Civil Service Classification of Jefferson County to serve as an election official in a **general** election, for according to the information which I have received from Mr. Bainbridge, that was the question put to him and upon which he ruled.

It appears from Mr. Bainbridge's ruling that he concluded that such employees were prohibited from serving as an election official in such a general election. I cannot agree with him in this regard.

The pertinent portion of the Jefferson County Civil Service Act, set forth in your letter of inquiry, is subsection (e) of Section 30, which is as follows:

"(e) No employee shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, **or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately** to express his opinion and to cast his vote."

This provision is almost identical with subsection (e) of Section 26 of the State "Merit System Act" (Act No. 58, S. 44, approved March 2, 1939, General Acts, 1939, pages 68, 83), which is as follows:

"(e) No employee in the classified service shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote. Provided, however, nothing herein shall prohibit any person in the classified Service from serving out the terms of a party office for which he had been elected at the time this Act goes into effect."

In construing Section 26, I held in a letter addressed to Hon. Chris J. Sherlock, State Highway Director, under date of May 4, 1940:

"It is my opinion that there is nothing in the Merit System Act which would prevent such an employee (an employee under the Merit System Act) from serving as an election official."

While I did not attempt at the time of writing the letter to Mr. Sherlock to go into detail concerning the proposition, I believe I should set out here my reasons for disagreeing with the distinguished attorney for the Jefferson County Personnel Board.

Section 30(e) of the Jefferson County Civil Service Act is restrictive in its nature and in interpreting this section, as in interpreting other general restrictive laws, one must ever bear in mind the real intent and purpose of the law. According to H. Eliot Caplan, Executive Secretary of the National Civil Service Reform League, a recognized authority on public personnel administration, statutory restraints against political activities are essentially designed to "curb offensive, obnoxious and pernicious activities of employees so as to make our civil service as neutral, non-partisan and impartial as possible under a democracy." See article on "Political Neutrality of the Civil Service in the **Public Personnel Review** for April, 1940, pages 10, 20.

It is noted by the author that:

> **"These laws were never intended to place the employee in a political straight jacket** * * * Realism and practical sense must be injected into the administration of these laws." (Emphasis supplied.)

It appears to me that a reasonable and practical construction of the statute demands that a clear distinction be made as to the right of employees to participate in political activities which are patently non-partisan in character, and which do not directly affect or influence the election of any particular party candidate. It will be noted from subsection (e) of Section 30 that the prohibition is against **partisan** activity, it being provided that no employee shall be a member of a committee of a political party or an officer of a partisan political club or a candidate for election or nomination to any public office, nor take part in the management or affairs of any political party or any political campaign. The acts permitted by subsection (e) i.e., the exercise of the right as a citizen privately to express an opinion and to cast a vote, must be read in connection with the acts prohibited, and should not, in my opinion, be construed as a total limitation. If the construction placed upon the act by the attorney for the Personnel Board is correct, then it would not have been necessary for the Legislature to have defined particularly the acts prohibited. All that would have been necessary was to have said: "An employee may only exercise his right as a citizen privately to express his opinion and to cast his vote."

Service as an election official in a general election is not, in my opinion, within the inhibition of subsection (e) of Section 30, for it is the performance of a civic duty and does not in any manner directly affect or influence the election of any particular party candidate. That such service is non-partisan in character is in effect insured by the criminal statutes of this state relating to the holding of elections and the actions of election officials. See Chapter 123, Code of Alabama, 1923, Sections 3891-3940.

Since, therefore, such employees will not be taking part in the management or affairs of a political party or a political campaign, but will rather be performing a public service and a duty imposed by law, it is my opinion that there is no inhibition contained in the Jefferson County Civil Service Act which would prevent a classified employee from serving as an election official.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 31, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

School—Counties—

Colored School Supervisor of Elmore County may be furnished office quarters outside the Court House, which shall be paid for out of County funds rather than school funds.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of October 15, 1940, is as follows:

"Your opinion on the following will be greatly appreciated.

"Where the county does not have enough room in the courthouse for an office for the Colored School Supervisor, is the County Board of Education authorized to pay the rent on an office outside of the courthouse? If this cannot be paid by the Board of Education, can the Board of County Commissioners legally pay this rent?"

It is my opinion that the Colored School Supervisor of Elmore County may be furnished an office outside the Court House to be paid for by the Court of County Commissioners.

My investigation discloses that the Colored School Supervisor referred to in your inquiry is one of the County Superintendent's Assistants appointed under the authority of Section 169 of the 1927 School Code and paid largely out of the funds of the County Board of Education of Elmore County as supplemented by certain philanthropic funds. Section 169 is as follows:

"169. **Assistants to County Superintendents, Office, Etc.**—The County Board of Education may in its discretion provide upon the nomination of the County Superintendent of Education, at least the following assistants: an elementary school supervisor and a statistical and stenographic clerk. No person shall be eligible for appointment as such supervisor who does not hold a certificate of administration and supervision as required of County Superintendent of Education. The County Board of Education may employ additional clerical and professional assistants, including health supervisors, and may reimburse them for all actual traveling expenses necessary in the performance of their official duties. The County Superintendent is hereby required to maintain an office at the County seat. The County Board of Revenue or Court of County Commissioners shall provide the County Superintendent of Education and his professional and clerical assistants with ample, convenient and comfortable office quarters. The County Board of Revenue or Court of County Com-

missioners shall also provide necessary furniture, office equipment, stationery, postage, forms and supplies required by the County Superintendent of Education and his assistants."

It is apparent from the above section that it is mandatory upon the Court of County Commissioners to provide the County Superintendent of Education and his Assistants with ample, convenient and comfortable office quarters. This, in my opinion, would include providing an office for the Colored School Supervisor.

In your inquiry you ask whether or not the office in question may be provided by the County Board of Education. It is my opinion that same should not be paid for by the County Board of Education, but should be paid for by the Court of County Commissioners. As stated above, Section 169 of the School Code makes it mandatory upon the Court of County Commissioners to provide office quarters for the County Superintendent of Education and his Assistants. Furthermore, in the case of **Woodruff v. Beeland,** 127 So. 235, 220 Ala. 652, the Supreme Court, in passing upon the authority of the County Board of Education to give the Superintendent of Education a certain expense allowance, said:

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred."

In the situation here presented, I find no law authorizing the County Board of Education to make such an expenditure. In an opinion of the Attorney General (Quarterly Report Attorney General, Vol. XIX, page 233), it was held that certain supplies which came within the purview of Section 169 of the School Code should not be paid for by the County Board of Education, but should be paid for by the Court of County Commissioners. Therefore, it is my opinion that the Colored School Supervisor may be furnished office quarters outside the Court House, and that same should be paid for with County funds rather than with school funds.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 31, 1940.

Hon. Jas. C. Brown, Register,
Tuscaloosa County,
Tuscaloosa, Alabama.

Witness Fees—Condemnation Proceedings—

Witnesses in Condemnation Proceedings are entitled to a per diem of $1.50.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of October 14, 1940, in which you request my opinion as follows:

"IN RE: WITNESS FEE IN SLOT MACHINE CASES AND CONDEMNATION PROCEEDINGS OF CARS FOR ILLEGALLY CONVEYING BEVERAGES ETC.

"The question has arisen in this Court (Tuscaloosa County Circuit Court in Equity) as to whether a witness fee in Slot Machine Cases should be Seventy-Five Cents or One Dollar and a half.

"Kindly furnish me your opinion as early as possible as to whether it should be $.75 cts. or $1.50.

"Also please furnish me your opinion as to what a witness is entitled to in condemnation proceedings of automobiles or other conveyances for illegal transportation of prohibited beverages."

Section 6 of Act No. 671, H. 423, approved July 25, 1931 (General Acts, 1931, page 806), requires the Solicitor or other prosecuting officer to file a bill in equity to condemn gambling devices which have been seized by the Sheriff.

Likewise, Section 4779 of the Code of Alabama, 1923, provides that a petition in equity shall be filed by the Solicitor or other prosecuting officer to condemn property seized for transporting prohibited liquor.

From the above provisions, it is seen that the condemnation proceedings brought in slot machine cases and in cases concerning conveyances used for transportation of prohibited beverages are proceedings in equity. They are not criminal proceedings as has been held by our appellate courts in the case of **State ex rel. Holcombe v. Stone,** 155 So. 636, 26 Ala. App. 187, Cert. Den. 229 Ala. 88, but they are "penal proceedings in rem." Therefore, they are civil proceedings.

Section 7233 of the Code of Alabama, 1923, provides that witnesses are allowed $1.50 per day in civil cases. Therefore, it is my opinion that witnesses in the condemnation proceedings referred to above are to receive a per diem of $1.50.

It will be noted that in Section 10 of Act No. 671, supra, it is provided that where the State fails to convict, or where the costs are not collected by execution, that the costs shall be paid as in criminal cases in which the State fails. A similar provision is found in regard to the condemnation proceedings instituted against property used in transporting prohibited liquors. These provisions, however, do not provide that the costs and fees shall be in the same amount as in criminal cases, but merely that in certain instances, such as an acquittal, the costs are to be **paid** as in criminal cases where the

State fails to convict. Cf. Opinion to Hon. G. H. Boyd, Register Circuit Court, Jefferson County, under date of May 11, 1940 (Quarterly Report Attorney General, Vol. XIX, page 129).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 31, 1940.

Hon. Joseph E. Easterling,
Treasurer, Chilton County,
Clanton, Alabama.

1.—Clerks of Circuit Courts are entitled to fees in criminal cases as scheduled in Section 3739 of the 1923 Code.

2.—Section 4039 of the 1923 Code as amended enumerates the conditions under which fees of officers are payable from the fine and forfeiture fund.

3.—Payment of registered claims against the fine and forfeiture fund is never barred.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of October 15, 1940, in which you request my official opinion as follows:

"Mr. J. Z. Mims, former Circuit Clerk of Chilton County, has presented to me for payment several claims against the Fine and Forfeiture Fund. Mr. Mims went out of office in January, 1935, and these claims, at his request, have been held in abeyance awaiting final determination of the affairs of his office. Mr. Mims made final settlement with the State some few months ago and now presents these claims to me for payment. It appears of record that the services herein charged for were performed by the said J. Z. Mims, as Clerk of the Circuit Court of Chilton County, Alabama.

"I am herewith enclosing a copy of one of these claims which is typical of them. The defendant in this case was turned over to the State as provided in the General Acts of the Legislature of 1927. The State Convict Department under Section 3667 of the Code paid certain items of cost to the clerk, but there are other items of cost which Mr. Mims is claiming under Section 3739 of the Code, were not paid. These consist of, as you will notice, a fee for 50c for issuing execution, recording indictment 15c per 100 words, sentence fee of 25c and continuance fee of 25c. The defendant was proved insolvent by the return of an execution, 'No

property found'. Under Sections 2671 and 4039 of the Code of 1923, he is claiming that these claims are a proper charge against the Fine and Forfeiture Fund of the County. The point in my mind about which there might be some doubt was the fee of 50c for issuing execution, however, this item appears in the scale of legal fees under Section 3739, and it also seems to have been decided affirmatively in Reports of the Attorney General 1926 to 1928, page 674. I have also been asked to cite to you Opinions of Attorney General, 1930-32, page 557; Opinions of Attorney General, 1928-30, page 225; also the case of Mims, County Treasurer v. State, 180 Ala. 511, 61 So. 811; Isbell National Bank v. Burke, 25 Ala. App. 414, 147 So. 651.

"You will notice that this claim was registered January 2, 1935, and I know of no statute that would bar the claim as a matter of time, however, I am presenting this to you and will you please advise me whether or not this is a legal claim against the Fine and Forfeiture Fund and should be paid when there is a surplus, as provided by law."

Before attempting to answer your inquiry, I wish to state that you failed to enclose a copy of one of the claims which Mr. Mims holds. I do not believe this makes any material difference since you give a description of it and state that it is typical of all the claims held by him.

Under Section 3739 of the 1923 Code of Alabama is a schedule of the fees to which clerks of the circuit courts are entitled in Criminal cases. Section 4039 as amended by General Acts 1926-27, page 45, provides in detail the manner in which all or any part of these fees may become a charge against the fine and forfeiture fund of a county.

As you know, Sections 3667 and 3668 of the 1923 Code provide that the State may pay certain items of cost in criminal cases up to the amount of $250.00. This is true in misdemeanor as well as felony cases. Quarterly Report of Attorney General, Volume XVIII, pages 111 and 265.

Therefore, it is my opinion that the claims of Mr. Mims against the fine and forfeiture fund of your county, said claims representing fees due him as former clerk of the circuit court in cases in which part of the costs have been paid by the State, are legal claims against the said fund and should be paid. It is assumed, of course, that the fees claimed by Mr. Mims are authorized by Section 3739 of the Code of Alabama, 1923, and that by virtue of Section 4039 of the Code, they are claims against the Fine and Forfeiture Fund, provided there is a surplus over and above the amount necessary to pay registered claims of state witnesses.

In reply to the second part of your inquiry, I wish to advise that, if these claims have been properly registered as required by law, payment of the same is not barred. This office has heretofore held that payment of registered claims is never barred. Quarterly Report of Attorney General, Vol. XV, page 302; Quarterly Report of Attorney General, Vol. XVI, page 176.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 5, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
The Capitol.

Justices of the Peace—Bail—Authorized to declare forfeiture against bail bond returnable to his court.

Trial Tax—Defendant cannot be sentenced to hard labor to pay trial tax.

Fines—Revenue Laws—Fine for violation of offense for having improper motor vehicle license tag payable to county fine and forfeiture fund.

Probation—Sheriffs—Fees—No arrest fee allowed in cases of probation violators.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 26, 1940, in which you request my official opinion as follows:

"Please substitute this letter and the questions herein in place of my letter to you under date of October 7, 1940.

"1. Can a Justice of Peace enter Forfeiture against a defendant and bail in cases where bond is returned to his court?

"2. Can a defendant be legally sentenced to hard labor for the State Trial Tax, included in the cost bill?

"3. Arrest by License Inspector for improper tag, required to buy proper tag and fined twice the cost of the new tag plus the costs in the case. What fund, County or Highway Patrol, is entitled to the fine?

"4. Probationer violates provisions of his probation and arrest is ordered by Circuit Judge. Where does Sheriff get arrest fee? What, if any, is the proper arrest fee under the above conditions where:

"1. The original offense was a misdemeanor?

"2. The original offense was a felony?

"Inasmuch as these matters are of constant concern to us in our official work I would appreciate very much your earliest attention to this request."

My answer to your first request, which is

"1. Can a Justice of Peace enter Forfeiture against defendant and bail in cases where bond is returned to his court?"

is in the affirmative. I call your attention to Section 3797, Code of Alabama, 1923, which is as follows:

"3797. **Criminal jurisdiction vested in what courts and officers.**—The criminal jurisdiction of this state is vested in the circuit courts, county courts, justices of the peace, and such other courts and officers as are by law clothed with criminal jurisdiction."

The section above sets out what courts have criminal jurisdiction and among these we find justices of the peace are included. When express jurisdiction is conferred upon a court, everything necessary to effectuate that jurisdiction is implied. **Ex parte The State of Alabama,** 71 Ala. 363. In this connection I call your attention to Sections 3387 and 3388, Code of Alabama, 1923, which are as follows:

"3387. **Undertaking of bail; essence of, and when forfeited.**—The essence of all undertakings of bail, whether upon a warrant, writ of arrest, suspension of judgment, writ of error, or in any other case, is the appearance of the defendant at court; and the undertaking is forfeited by the failure of the defendant to appear, although the offense, judgment, or other matter is incorrectly described in such undertaking, the particular case or matter to which the undertaking is applicable being made to appear to the court.

"3388. **Proceedings on forfeiture of undertaking; judgment nisi.**—Whenever an undertaking of bail is forfeited by the failure of the defendant to appear as required, a conditional judgment must be rendered by the court in favor of the state, for the use of the proper county, against the parties to the undertaking for the sum thereon expressed; which judgment may be substantially as follows:

The State	)	Indictment for assault and battery
vs.	)	(or other offense, as the case
A. B.	)	may be).

It appearing to the court that said A. B. together with C. D. and E. F. agreed to pay the State of Alabama, ... dollars (the sum specified in the undertaking), unless the said A. B. appeared at the time and place mentioned and fixed in the bond or undertaking, to answer in this case; and the said A. B. having failed to appear at the time and place mentioned in the bond or undertaking, it is therefore ordered that the State of Alabama, for the use of ..... county, recover of the said A. B., C. D. and E. F., on said undertaking, the sum of ..... dollars (the sum specified in the undertaking), unless they appear at the next session of this court, and show cause why this judgment should not be made absolute."

These sections deal with forfeiture of bail bonds and are applicable to all the courts designated in Section 3797, supra, and, as above limited, confer on justices of the peace the right and power to forfeit such bonds when the defendant fails to appear. 6 C. J., p. 1045, Section 317.

(2) My answer to your second request, which is as follows, is in the negative.

"2. Can a defendant be legally sentenced to hard labor for the State Trial Tax, included in the cost bill?"

Our courts of last resort have held trial tax not be cost, but a tax—a revenue measure. **State v. Montevallo Coal Mining Company,** 197 So. 82, Advance Sheet, August 1, 1940. This being true, your attention is called to the case of **Johnson v. the State,** 85 Tenn. 325. In this case the Supreme Court of Tennessee was dealing with a statute almost on all-fours with the one we have in this State as to trial tax. The Supreme Court of Tennessee in rendering its opinion, held that a defendant convicted of a criminal offense could not be sentenced for the trial tax, it being no part of the cost of the prosecution, stating: "This tax is in no sense any more cost in a criminal case than in a civil case. Neither is it imposed by the way of punishment in a criminal cause any more than in a civil cause." Again in this opinion, the Tennessee Court says, "In the case of Eastman v. Nashville, 3 Lea 717, it was held that a tax imposed by the State upon all litigation in municipal courts, was not a tax imposed upon the city, or any of its machinery for government, but was a tax imposed alone upon the defendant found guilty, and that such a tax could not be collected by confinement as it was no part of the costs." See also the case of **State v. Montevallo Coal Mining Company,** supra. Quarterly Report of Attorney General, Volume XVII, page 40.

(3) Your third request is as follows:

"3. **Arrest by License Inspector for improper tag,** required to buy proper tag and fined twice the cost of the new tag plus the costs in the case. What fund, County or Highway Patrol, is entitled to the fine?"

In my opinion this fine would go to the county, as displaying an improper tag is a violation of the General Revenue Act of 1935, Act No. 194, H. 324, approved July 10, 1935, General Acts 1935, page 256. I call your attention to Section 353, page 559, General Revenue Act of 1935, supra, where it says,

"(a) If the License Inspector shall discover any motor vehicle being operated without a proper or legal license, he shall cite the operator of the motor vehicle, and in filing copy of such citation with the Probate Judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof."

Further on in the same section, there is provision made for prosecution of failure to conform or do any of the things required in said section and is as follows:

"If such delinquent shall fail or refuse to take out a license, the License Inspector shall institute or cause to be instituted a criminal proceedings against such delinquent before any court having jurisdiction of such offenses."

I now call your attention to Section 4038, Code of Alabama, 1923, which is as follows:

"4038. **Fines to go to county, and judgment accordingly.**—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

Biennial Reports of Attorney General 1932-34, page 58; 1936-38, page 190.

(4) Your fourth request is:

"4. Probationer violates provisions of his probation and arrest is ordered by Circuit Judge. Where does Sheriff get arrest fee? What, if any, is the proper arrest fee under the above conditions where:

1. The original offense was a misdemeanor?

2. The original offense was a felony?"

I find no provision to pay any officer for making an arrest of a probationer who violated the terms of his probation. I call your attention to Section 6 of an Act known as the Probation Act, No. 278, S. 198, approved October 24, 1939 (General Acts 1939, page 434), which section is as follows:

"Section 6. TERMINATION OF PROBATION. ARREST. SUBSEQUENT DISPOSITION. The period of probation or suspension of execution of sentence shall be determined by the court and such period may be continued or extended. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered on its minutes discharge the defendant. At any time during the period of probation or suspension of execution of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any probation officer, police officer or other officer with power of arrest upon the request of the probation officer, may arrest a probationer without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation and said statement shall be sufficient warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until such probationer shall be brought before the court. Such probation officer shall forthwith report such arrest and detention to the Court and submit in writing a report showing in what manner the probationer has violated probation. Thereupon the court, after a hearing, may revoke the probation or suspension of sentence and shall proceed to deal with the case as if there had been no probation

or suspension of execution of sentence; and, in cases certified from a court of inferior jurisdiction, shall order and adjudge that the sentence be immediately executed."

Neither the above Section or any other portion of this Act makes any provision for a fee for such arrest. Therefore, it is my opinion that no such fee can be charged for an arrest in these proceedings.

In this connection I call your attention to an opinion of this office written October 17, 1939 to Hon. William A. Conrad, Clerk of the Circuit Court of Mobile County, Quarterly Report of the Attorney General, Volume XVII, page 87. Also to an opinion of this office written September 12, 1940 to Hon. V. W. Elmore, Judge of the 24th Judicial Circuit, Quarterly Report of the Attorney General, Volume XX, page 270.

However, I might add if such an arrest is made by the Sheriff, such fee for the arrest may become a part of his ex-officio fees under Section 7287, Code of 1923, as amended by Act No. 210, H. 139, approved May 27, 1931 (General Acts, 1931, page 261), provided his annual income from fees of office does not exceed $5,000.00 net. Such fees are for the purpose of taking care of any services rendered by the Sheriff where no expressed compensation is provided.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 5, 1940.

Hon. W. P. Tartt,
Register of Circuit Court, In Equity,
Sumter County,
Livingston, Alabama.

Register—Recording Fee—Cases transferred to the Equity Court —Code of 1923, Sec. 6507 (7) —

Pleadings and papers filed and recorded in the Circuit Court or Probate Court should not be recorded in the Equity Court unless the Circuit Judge so orders.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of October 14, 1940, in which you request my opinion as follows:

"Where cases are transferred from the Circuit Court or Probate Court and papers have been recorded and so marked by these respective

Courts, to my Court in Equity, is it necessary for me to record these same papers in my Court or not.

"I presume all papers whether filed in my court or not and so transferred to the Circuit Court in Equity should be recorded in my books and charges made for same in order that my records should tally with papers in the file, but want your opinion."

It is my opinion that the papers referred to in your request should not be recorded in the Register's Office unless the Circuit Judge so orders. Section 6507 of the 1923 Code of Alabama prescribes the duties of the Register in Chancery. Sub-section 7 of Section 6507 provides as follows:

"6507. **Duties of register.**—It is the duty of the register within his respective county—

* * * * * * *

7. To record, in well-bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating except those previously recorded under section 10129 (5736), and except as otherwise provided by this Code or ordered by the circuit judge."

It will be noted that Sub-section 9 of section 6724 of the 1923 Code of Alabama, which Section sets out the duties of Clerks of the Circuit Courts, is very similar to Section 6507, Sub-section 7, supra. Section 6724, Sub-section 9, provides as follows:

"6724. **Their duties.**—It is the duty of the clerk of the circuit court—

* * * * * * *

9. To record in well-bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under section 10129 (5736), except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions."

In an opinion of the Attorney General to Hon. W. O. Brownfield, Clerk of the Circuit Court of Lee County, rendered September 28, 1939 (Quarterly Report Attorney General, Vol. XVI, page 298), it was held:

"When a civil suit is removed by change of venue from one circuit court to another, the clerk of the circuit court first taking jurisdiction is entitled to his costs and fees for recording the proceedings filed with him and the circuit clerk of the circuit court last taking jurisdiction is entitled to collect his costs and fees for that part of the proceedings recorded by him as part of the final record and not previously recorded by the clerk of the court first taking jurisdiction of the case."

In an opinion of this office to Hon. Frank Head, Register of the Circuit Court of Shelby County, rendered on March 15, 1939 (Quarterly Report Attorney General, Vol. XIV, page 181), it was held that where a case was transferred from the law side to the equity side of the Circuit Court it did not constitute an original case on the equity side in regard to trial tax.

It appears to me that where papers have been filed and recorded in the law or probate court and the case is subsequently transferred to the equity side of the court, it would be unnecessary duplication to record the papers already recorded in the other courts.

Therefore, it is my opinion that papers which have been filed and recorded in the probate court or on the law side of the Circuit Court should not be recorded by you if the case is transferred to the equity side of the Circuit Court unless the Circuit Judge so orders.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 5, 1940.

Hon. E. W. Pettus, President,
County Board of Education,
Dallas County,
Selma, Alabama.

Teachers' Retirement System—Retirement Benefits—Retirement prior to 1943.

Teachers employed in the public school system of the State are not entitled to retirement benefits under the provisions of Act No. 419, S. 362, approved September 15, 1939, General Acts, 1939, page 559, prior to October 1, 1943, unless they have attained or shall attain the age of seventy years by said date.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of October 29, 1940, follows:

"I am enclosing memorandum of service rendered by Miss Corrie Finklea, afterwards Mrs. Miree Fuller, as a teacher in Alabama schools. She has taught a total of 22 years, and was 64 years old in May, 1940. She is not employed for the current year. The statement has been made to the County Board of Education that if she was employed this year and would teach as much as six months she would be entitled to a pension or teacher's retirement benefits. Our Board does not want to deprive her of a pension if six months additional teaching will make her eligible. If you will advise me about this it will be greatly appreciated."

You ask in the above opinion if Miss Corrie Finklea, now Mrs. Miree Fuller, who has been teaching in the public school system of Dallas County, Alabama for a period of twenty-two years, will be entitled to retirement benefits under the provisions of Act No. 419, S. 362, approved September 15, 1939, General Acts, 1939, page 559, if she is given six months additional employment during the current school year. It appears from your request that Mrs. Fuller is now sixty-four years of age.

My answer to this question is in the negative.

Your attention is called to subheads (a), (b), and (c) of subdivision 1 of Section 5 of Act No. 419, supra, which reads respectively as follows:

> "(a). Any member in service may retire upon written application to the Board of Control setting forth at what time, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired, provided, that the said member at the time so specified for his retirement shall have attained age sixty, and notwithstanding that during such period of notification he may have separated from service. (b) Any member in service who has attained age seventy shall be retired forthwith, provided that with the approval of his employer he may remain in service until the end of the school year following the date on which he attains age seventy. (c) Notwithstanding the provisions of paragraphs (a) and (b) immediately preceding, prior to October first, nineteen hundred and forty-three, retirements under paragraph (a) shall be restricted to teachers who have attained or shall attain age seventy and no retirements shall be made under the provisions of paragraph (b)."

It will be noted from subhead (c) that, notwithstanding the provisions of subheads (a) and (b), teachers employed in the public school system of the State will not be eligible for retirement or entitled to the benefits provided by said act prior to October 1, 1943, unless they have attained or shall attain the age of seventy years prior to said date.

As Mrs. Fuller is now only sixty-four years of age, she cannot attain the age of seventy years prior to October 1, 1943. Therefore, the additional six months employment by your Board would not entitle her to benefits under the Act here considered.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 6, 1940.

Hon. R. E. Woodruff,
Judge of Probate,
Lowndes County,
Hayneville, Alabama.

Filing Tax—Deeds—Mortgages—

1. Deed executed prior to October 1, 1923 not subject to deed filing tax.

2. Deed executed prior to October 1, 1923, reciting unpaid purchase money as part of the consideration not subject to mortgage filing tax, when offered for record, provided prior to record purchase money was fully paid.

Revenue Act 1935, Sec. 348, Schedule 46, Revenue Act 1935, Sec. 348, Schedule 94.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated October 29, 1940 follows:

"There has been filed in this office for record an old deed, a copy of which I made below.

"At the present time such a deed would carry a deed tax on the cash payment of $100.00 and a mortgage tax on the deferred balance of $1100.00.

"Since this deed was made prior to October 1923 and there is no deed tax due on it, and since the mortgage debt has been cleared since January of 1909, would there be a mortgage tax on the $1100.00?

"The State of Alabama, }
Lowndes County. }

Know all men by these presents, That I, Bettie C. Pritchett an unmarried woman for and in consideration of twelve hundred dollars to be paid to me by Kirk Long in the following manner, Viz: One Hundred ($100.00) dollars cash on the delivery of these presents, and eleven hundred ($1100.00) dollars to be paid on the first day of January, 1909, the receipt of the One Hundred dollars is hereby acknowledged; do grant, bargain, sell and convey to the said Kirk Long the following described real estate: Viz: the North west quarter of Section Twenty Three (23) Township Fourteen (14) Range Thirteen (13) containing 160 acres more or less, situated in said State and county,

near Gordonsville, and known as the Beasly place, being the same land conveyed to the undersigned by Geo. E. Gordon and wife Mary H. Gordon on the 15th day of March 1898.

"Witness my hand and seal this the 8th day of August, 1908.

"Witness: B. C. Pritchett (L.S.)

"G. M. Williamson."

From the above statement, it does not appear when the unpaid purchase money recited as payable January 1, 1909 was in fact paid. It does appear however that it had been paid prior to offer of the deed for record. It is inferred therefore that the deed is now offered for record solely as a muniment of title in the grantee.

Admittedly said instrument, executed prior to October 1, 1923, is not subject to the deed filing tax (Revenue Act of 1935, Section 348, Schedule 46, General Acts, 1935, pp. 256, 456). Opinion to Judge of Probate of Clarke County on April 16, 1935 (copy enclosed).

Nor in my opinion is it subject to the mortgage filing tax imposed under Schedule 94, of Section 348 of the Revenue Act, supra, for the reason that when offered for record it could not be said "to secure the payment of any debt," to quote the language of the schedule. The character of the instrument in question as an "instrument of like character" (to a mortgage) vanished upon payment of the recited unpaid purchase money. Had the fact of such payment been noted or endorsed by the grantor, prior to offer for record by the grantee, there could be no question as to that proposition.

But whether so endorsed or not, the instrument in question is no longer in fact an instrument "to secure the payment of any debt" and is therefore, in my opinion, immune to the mortgage filing tax, whether it be regarded as a deed under Schedule 46, supra, or a deed under subdivision (c) of Schedule 94, supra. Cf. Opinion to Judge of Probate of St. Clair County, on January 31, 1935 (copy enclosed).

Whatever ambiguity (and no doubt there is some, possibly) there may be as to the meaning of the statute in this respect, must be resolved in favor of the taxpayer under familiar rules of law.

State v. Roden Coal Co., 197 Ala. 407, 417 (4);

Ashe Carson Co. v. State, 138 Ala. 208, 35 So. 38;

Cooley on Taxation, 266.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 7, 1940.

Hon. Frank N. Julian,
State Fire Marshal Ex-Officio,
Department of Commerce,
Capitol.

Interstate Commerce—Sale and use of liquefied Petroleum Gas, Gas Containers, Tanks and Apparatus—

Manufacturer in another state of Liquefied Petroleum Gas, gas containers, tanks and apparatus, engaged solely in shipping and selling his produce to dealers in this State, not required to file with the Superintendent of Insurance, as State Fire Marshal Ex Officio, the bond provided for by Section 1 of Act No. 605, H. 644, approved July 6, 1940.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of September 13, 1940, follows:

"Re: Act No. 605 (H. 644) Legislative Session 1940.

"In administering the above Act, the State Fire Marshal has called on all manufacturing dealers that are interested, and we are now confronted with the following question:

"A manufacturer of gas systems located in another state insists that in selling the necessary assembly systems to dealers in the State of Alabama, that the said foreign manufacturer being engaged in interstate commerce, does not come under the requirements of Section 1 of the Bill that you will note provides for a posting of a $5,000.00 bond.

"Will you please advise this office whether or not manufacturers engaged in shipping a product into the state, selling only to dealers should be required to file this bond; giving consideration to the claim that the said manufacturers are engaged in Interstate Commerce."

The act above referred to is not free from ambiguity, uncertainty and obscurity. It is my problem to determine as best I can whether or not a manufacturer residing and doing business in another state whose operations in Alabama are confined to shipment into Alabama of equipment and apparatus, for the use of liquefied petroleum gas, is subject to the requirement imposed by the act of "posting" with the Fire Marshal a bond in the penal sum of $5,000.00, "guaranteeing that each such installment shall be designed, constructed, equipped and installed," pursuant to regulations prescribed by the Fire Marshal "for the safety of the public and the users of such gases."

Section 1 of the act expressly requires that manufacturers who either sell or install such equipment and apparatus for the storage, transportation,

handling, or use of such gases, shall post with the Fire Marshal such bond with the aforementioned condition. There would seem, therefore, to be some incongruity in requiring a manufacturer, who merely manufactures the equipment or apparatus and is in no wise connected with or responsible for the installation thereof by a dealer in another state, to comply with this requirement.

It is very true that interstate commerce business, as to which the general rule is that the several states may not interfere, is subject to reasonable regulation under the police power of the states, in the interest of public health and safety. It is difficult to see, however, the reasonableness of any regulation or legislative enactment which in effect makes the manufacturer now under consideration a guarantor or insurer of safe installation of apparatus and equipment which he has sold, but does not undertake to install, or in any way supervise.

If the act in question required him to furnish a bond insuring the user of his apparatus and equipment against defects, whoever might install the same, the reasonableness of such a regulation or requirement is readily perceived. This, however, is not the case; and as I construe it, if we interpret this act literally, the effect is to require the manufacturer to insure or guarantee the safe installation of his equipment or apparatus, although in his dealings with domestic dealers he has entered into no such undertaking, and has, in fact, lost all supervision and control thereof after sale, shipment and delivery thereof to dealers in Alabama.

This is the first difficulty with which I am confronted in undertaking to construe this act. Section II of the act is directed at the sale of the gases themselves. Under it, a manufacturer, among others who presumably are selling such gases, is required to apply to the Fire Marshal for a permit to engage in such business and to furnish the aforementioned bond prescribed by Section I, supra, relating solely to the installation of apparatus and equipment. The furnishing of such a bond is a condition precedent to the issue of a permit by the Fire Marshal for sale of the gases and/or sale and installation of equipment to use the same. Non-compliance with this requiremnt is ground for revocation by the Fire Marshal of any permit he may issue, although a permit is not authorized without bond. Violation of the Fire Marshal's rules and regulations or of any provision of the act is also made a misdemeanor punishable by fine or imprisonment.

It is to be noted, however, and it may be very material for the purposes of this inquiry, that in Section III of the act containers and equipment approved by the interstate commerce commission are exempt from the operation of the act.

The net result, as I see it, is that the act was not intended to apply to interstate commerce business of the character under consideration. The real question is whether any requirement by statute or statutory regulation, whereby a manufacturer engaged solely in selling and shipping equipment from another state to dealers in Alabama, to be sold and installed by them in Alabama, must guarantee safe installation thereof in Alabama, is a reasonble exercise of the state's reserved police power of regulation in matters affecting interstate commerce.

I cannot see the reasonableness of such alleged regulation, because, so far as I can see, it has no relation to the object and purpose of the act itself and does not in anywise tend to accomplish such object or purpose, to-wit: protection of the **users** of liquefied petroleum gases and regulation of the use of gases and **installation** of equipment for such use, in the interest of public safety, as announced in the title of the act itself.

You are advised, therefore, that in my opinion such a manufacturer as is described in the request for this opinion should not be required to furnish the bond provided for in Section I of the Act, supra.

> "A state statute should be construed, if possible, so as not to make it an interference with the exclusive power of Congress to regulate interstate commerce, and to this end a state statute will be construed, where it is susceptible of such construction, as affecting merely traffic wholly within the state where it would be in violation of the commerce clause of the Constitution if it were intended to affect interstate traffic." **15 C. J. S. p. 373.**

So far as I can see, the users of such equipment and the public also will be amply protected by the requirement of the surety bonds furnished by the dealers in Alabama who install such equipment and are clearly required by the act to furnish such bonds as a condition precedent to engaging in such business.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 8, 1940.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Butler County—Term of office of County Superintendent of Education—

Under Local Acts, 1927, p. 258, the term of office of the County Superintendent of Education of Butler County expires as soon after the General Election as his successor is qualified.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of November 6, 1940, in which you request my official opinion as follows:

"On yesterday Mr. Marvin P. Mantel was elected Superintendent of Education of Butler County, Alabama, to succeed Mr. Lloyd Woodruff, present encumbent. The election was held under local Act No. 333, approved August 23, 1927, and the regular election laws of Alabama.

"The local Act referred to above does not set out the date on which the newly elected superintendent takes office. The surety bond of Superintendent Woodruff expires November 20, 1940. Transactions of this office with that of the Butler County Board of Education requires us to know the name of the person holding the office of Butler County Superintendent of Education on any special date.

"Will you please let me have a prompt opinion as to the date of expiration of the term of Mr. Lloyd Woodruff as Butler County Superintendent and the date of which Mr. Marvin P. Mantel can become Butler County Superintendent of Education legally."

I call your attention to Sections 1 and 2 of Act No 333, S. 299, approved August 23, 1927, (Local Acts of 1927, p. 258) which provide:

"Section 1. That a County Superintendent of Education for Butler County, Alabama, who shall hold office until his successor is elected and qualified as hereinafter provided.

"Section 2. That at the next general election to be held in said county and state a County Superintendent of Education for Butler County, Alabama, shall be elected, who shall hold office for a term of four years and until his successor is elected and qualified, unless sooner removed for good cause, and each four years, thereafter, a County Superintendent of Education for Butler County, Alabama, shall be elected by the qualified voters of said County at the regular election held in said County and State, nomination for which office may be made in primary elections as other County officers."

This office, in considering an analogous case, held that the term of office of a member of the Board of Education of Bibb County began as soon after the General Election as his successor qualified. Quarterly Report of Attorney General, Vol. XIX, p. 316; cf. Quarterly Report of Attorney General, Vol. XIV, p. 51; cf. Quarterly Report of Attorney General, Vol. X, p. 152.

In considering a local act applicable to Geneva County, the identical question was presented to the Attorney General, and, in an opinion to Hon. Archie L. Faulk, Chairman, Geneva County Board of Education, dated July 2, 1934, (Biennial Report of Attorney General, 1932-1934, p. 597), it was held that the County Superintendent assumes office as soon after the election as he is qualified. This office quoted with approval the case of **Prowell v. State,** 39 So. 164, as follows:

"Unless some other time is fixed for the beginning of the term of office, the general presumption is that it dates from the legal ascertain-

ment of the result of the election and the officer assumes the duties of his office as soon thereafter as he can qualify and receive his commission."

Cf. Quarterly Report of Attorney General, Vol. V, p. 49.

It is therefore my opinion that the term of office of the present Superintendent of Education of Butler County expires as soon after the General Election as his successor is qualified.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 8, 1940.

Hon. D. Hardy Riddle,
Judge of Probate,
Talladega County,
Talladega, Alabama.

Alderman—

1. Alderman may not hold salaried job for the municipality of which he is Alderman.

2. Alderman may not lawfully sell goods, wares or merchandise for a profit to the town which he serves as Alderman.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of October 18, 1940, in which you request my opinion as follows:

"Please give me an official opinion as to the following questions at your earliest convenience and oblige:

"1. Can an Alderman serve as Clerk or policeman or hold any other salaried job for a city or town for which he receives pay and still serve as alderman?

"2. Can an alderman lawfully sell goods, wares or merchandise for a profit to the town while he serves as alderman?

"Please give me this opinion immediately because one or more towns in my community will await your decision before making some appointment."

It is my opinion that both your inquiries are to be answered in the negative.

In my opinion Sections 1891, 1910 and 5003 of the Code of Alabama, 1923, prohibit an Alderman from selling goods, wares or merchandise for profit to the town or city which he serves as Alderman, and prohibit him from holding any other salaried position for the city.

Section 1891 of the Code of Alabama, 1923, reads in pertinent part as follows:

> "* * * And any mayor or alderman, or other member of the governing body or any municipality who shall have any private or personal financial dealings with, for or on account of the municipality, except such as are imposed by his official position, or who shall render any service or do any work or supply any commodity, for financial compensation, payable out of the funds of the municipality, shall be guilty of a misdemeanor, and the doing of such act shall also vacate the office of such person."

Section 1910 of the Code of Alabama, 1923, reads as follows:

> "1910. **Aldermen not interested in municipal contracts or business thereof.**—No Alderman or officer or employe of the municipality shall be directly or indirectly interested in any work, business, or contract, the expense, price or consideration of which is paid from the treasury, nor shall any member of the council, or officer of the municipality be surety for any person having a contract, work, or business with such municipality, for the performance of which a surety may be required."

Section 5003, Sub-section 2, of the Code of Alabama, 1923, reads as follows:

> "5003. **Misconduct of public officer.**—Every public officer who shall—
>
> *****
>
> "2. Be beneficially interested, directly or indirectly, in any contract, sale, lease, or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; or
>
> *****
>
> "Shall be fined not more than one thousand dollars and may be sentenced to hard labor for the county for not more than six months, and any contract, lease, sale, or purchase mentioned in subdivision 2 hereof shall be void."

Considering the above quoted provisions of law, it is my opinion that an Alderman cannot lawfully sell goods, wares or merchandise for a profit to the town which he serves as Alderman while he serves as Alderman, nor can he lawfully hold any other salaried position for the city.

In an opinion to Mrs. M. L. Wann, Tax Collector, Jackson County, under date of June 30, 1939, found in the Quarterly Report Attorney General, Vol. XV, page 350, it was held that a member of the city council may at the same time serve as city treasurer. It was held in that opinion that members of the city council were not officials of the State, and that they were not holding offices of profit under the State. Therefore, the prohibition of Section 280 of the Constitution of Alabama, 1901, does not affect Aldermen. However, I point out here that in the above cited opinion consideration was directed only to any violation of Section 280 of the Constitution. The above cited opinion is not applicable if the position to which the Alderman aspires is one for which he receives remuneration, for then he is subject to the prohibitions of the Code Sections cited above and cannot serve in such capacity while serving as Alderman.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1940.

Hon. F. O. McManus, Secretary,
Alabama Bridge Commission,
Montgomery, Alabama.

Traveling Expense—Alabama Bridge Commission—

Members of the Alabama Bridge Commission held limited to $3.00 per day traveling expense, but are not required to present itemized and verified receipts for items constituting said traveling expense before the same may be paid.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request for official opinion of October 8, 1940, which is as follows:

"The Alabama Bridge Commission is now being audited by the Examiners of Public Accounts, and it has been brought to my attention by the Examiners that the expense accounts of the Chairman and members of the Commission, while attending meetings of the Commission have, in some instances, exceeded three dollars per day. They also point out that the expense accounts are not supported by itemized receipts.

"It has been my understanding that members of the Alabama Bridge Commission were only required to make affidavit as to the correctness of their expense accounts and no receipts were required and that members of the Commissioner were not limited to three dollars per day.

"Will you please advise me if under the law, my understanding is correct.

"For your information, the funds of the Commission are deposited in a bank and are disbursed on vouchers signed by the Chairman and Secretary of the Commission."

In reply I wish to advise that, in my opinion, the members of the Alabama Bridge Commission are limited to $3.00 per day for traveling expenses, but itemized receipts are not required to be presented therefor. I wish to direct your attention to Act No. 580, H. 847, approved September 22, 1939 (General Acts, 1939, page 936) Section 1 of which provides in part as follows:

"* * * The members of said Commission shall be entitled to compensation only when actually rendering service for said Commission and the compensation shall not be more than $1.00 per diem and traveling expenses and the number of days per year for which compensation may be received shall not exceed 52. * * *"

The present Alabama Bridge Commission is a public body and a body corporate and politic. (Section 1 of General Act 1939, page 936, supra, "Said Commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings: * * *").

The Alabama Bridge Commission is an agency of the State of Alabama. See Sections 2½ of Act No. 590, supra. Also **Quarterly Report of Opinions of Attorney General,** Volume XVIII, page 311. **Alabama State Bridge Corporation v. Smith,** 211 Ala. 311, 116 So. 625. **Kansas City Bridge Corporation v. Alabama State Bridge Corporation,** 39 Fed. 2nd, 48, Cert. Den. 53 Sup. Ct. 990.

Since the Alabama Bridge Commission is an agency of the State, I am of the opinion that the members of the Alabama Bridge Commission and the employees of the Alabama Bridge Commission are subject to the provisions of the so-called McGowin Act, which is Act No. 87, H. 6, approved March 23, 1933 (General Acts, Extra Session 1933, page 81). This Act provides as follows:

"The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation shall be $3.00 per diem."

I am mindful of Section 3 of Act No. 580, H. 847, approved September 22, 1939 (General Acts, 1939, page 936) which provides as follows:

"Section Three. INCONSISTENT PROVISIONS IN OTHER ACTS SUPERSEDED. Insofar as the provisions of this Act are inconsistent

with the provisions of any other Act, general or special, the provisions of this Act shall be controlling."

It is my judgment, however, that no provisions of the said Act No. 580, H. 847, approved September 22, 1939, is in conflict with the above quoted McGowin Act. The provision concerning traveling expenses of the members of the Alabama Bridge Commission is general in its nature and does not provide for any set amount to be paid, nor does it provide for actual or necessary traveling expenses.

It is my opinion, therefore, that the provisions of the McGowin Act control in regard to traveling expenses of the members of the Alabama Bridge Commission. **Cf. Heck v. Hall,** 238 Ala. 274, 190 So. 280.

Concerning the necessity of supporting expense accounts by itemized receipts therefor I wish to advise that, in my opinion, no authority of law exists for such requirement. You state in your request that the funds of the Commission are deposited in a bank and are disbursed on vouchers signed by the Chairman and Secretary of the Commission. I wish to refer you to the **Quarterly Report of Opinions of the Attorney General,** Volume XIX, page 55, wherein I held that the provisions of Section 820 of the Code of 1923, requiring expense accounts for officers and members of the State of Alabama whose traveling expenses are not paid by warrant of the State Auditor (State Comptroller) from the State Treasury, are not applicable.

The above cited opinion, in my judgment, is wholly applicable to the situation presented by you and answers your question specifically. I enclose a copy of this opinion for your convenience.

The premises considered, it is my opinion and I wish to further advise, that members of the Alabama Bridge Commission are limited to $3.00 per day and actual expense of transportation while traveling on business of the State of Alabama.

It is further my opinion that it is not necessary that itemized and verified receipts for the items constituting the travel expenses be presented before such expenses may be paid.

The foregoing is not to be construed as applying to expenses which have heretofore been paid to such members by the Governor out of the Governor's contingent fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 12, 1940.

Hon. P. G. Lawley,
Tax Assessor,
Fayette County,
Fayette, Alabama.

Taxation—Oil and Gas Leases—

Under provisions of Subsection (a) of Section 10 of Revenue Act of 1935, oil and gas leases are subject to ad valorem taxation.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion under date of November 7, 1940, is as follows:

"We have received from several Oil Companies a compiled list of the several Tracts of land that they have under Oil & Gas lease in our County, and they request these filed as assessments with a value of about one half what they paid the land owner as down payment.

"All the property included in these above mentioned lists have been assessed by the several owners—Fee simple and I have so informed said Oil Companies.

"Now the question is—under the present law does the state have the right and would I be authorized to require such lessees of Oil & Gas Rights to assess and pay tax on such lease hold interest."

My answer to your inquiry is in the affirmative. Subsection (a) of Section 10 of the 1935 Revenue Act reads as follows:

"Section 10. The subjects of taxation, except as exempted by law, shall be as follows: (a) Every piece, parcel, tract or lot of land in this State, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as mineral the right to mine minerals; timber, and the right to turpentine; **oil or petroleum, natural gas and the right to remove same from the soil,** or any other interests when such interests are owned by persons other than the owner of the surface or soil, except growing crops." (Emphasis supplied.)

It appears from the plain, clear and unambiguous language in the above quoted statute that the right to remove oil, petroleum or natural gas is subject to the ad valorem taxes imposed by said Revenue Act. A lease conveys the

right to remove these products from the soil. An opinion reported in the Biennial Report of Attorney General, 1928-30, page 980, deals with the same question and holds that such leases are subject to ad valorem taxation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1940.

Hon. Wm. A. Conrad, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

Arbitration—Judgments—Proceedings and Appeal.

1. Where a matter is submitted to arbitration under provisions of Section 6157, Code of Alabama, 1923, and the award is turned in to the Circuit Court for filing, the case does not properly go up on the docket required to be kept by Subsections 2 and 3 of Section 6724, Code of Alabama, 1923. Such proceedings should be entered on book required to be kept by Subsection 8 of said Section.

2. Where a matter that has been arbitrated is appealed to the Court of Appeals or the Supreme Court, the Clerk is required to issue citation of appeal.

3. When an appeal is taken to the Supreme Court or Court of Appeals in a matter that has been so arbitrated, the appellant should be required to give security for cost of the appeals.

4. Where an appeal is taken from the award or judgment in an arbitration matter to the Court of Appeals or Supreme Court, it is the duty of the Clerk to make up the transcript upon which the appeal is based.

5. In an arbitration matter where no suit is pending in a court on the filing of the award with the Clerk of the Circuit Court, no final record is required.

6. If an appeal growing out of an arbitration is taken to the Court of Appeals or Supreme Court, the unsuccessful party is liable for the costs of the appeal unless the court orders otherwise.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion dated October 24, 1940, is as follows:

"The following is a copy of a document filed in my office on October 23, 1940, under Section 6170 of the Code of Alabama of 1923:

" 'IN THE MATTER OF ARBITRATION
OF CONTROVERSIES IN THE
ESTATE OF JOHN V. SCHEUERMANN
AND ALICE P. SCHEUERMANN,
Both Deceased.

NOTICE OF APPEAL FROM
AWARD OF ARBITRATORS
AS MADE AND DATED
OCTOBER 14, 1940.

" 'Comes Bertram R. Scheuermann, a sometimes called Bert R. Sherman or R. B. Sherman and hereby gives notice of and appeals to the Supreme Court of Alabama from the Award of Arbitrators Robert H. Smith, C. C. Inge and Thomas A. Hamilton as made and entered by them in the above entitled matters on, to-wit, October 14, 1940.

" 'Dated, signed and filed at Mobile, Alabama, this 23rd day of October, 1940 with the Clerk of the Circuit Court of the Circuit Court of Mobile County, Alabama, as provided by law, there being no suit pending involving the determination of the matters submitted and determined in said arbitration proceedings.

" 'WM. V. McDERMOTT

As Attorney for Bertram R. Scheuermann.

" 'I hereby certify that a copy of the foregoing was served by me upon each named Arbitrator on this 23 day of October, 1940.

" 'WM. V. McDERMOTT

As Attorney for Bertram R. Scheuermann.

" 'Filed Oct. 23, 1940,

Wm. A. Conrad, Clerk.'

"I therefore respectfully request your Honor's opinion on the following questions, viz:

"1. Should I place said proceedings on the docket as a case?

"2. Am I required to issue citation in appeal?

"3. To whom should I address citation in appeal?

"4. Is appellant required to give security for costs of appeal?

"5. Is it the duty of the Clerk of the Circuit Court to make up the transcript for the Supreme Court?

"6. Am I required to make final record of said proceedings?

"7. If appellant is successful in the Supreme Court, who would be liable for costs of court?

"An early opinion will be greatly appreciated?"

I have carefully examined the opinions of this office for many years past, and I find no opinion which in any way deals with the questions which you present in your letter of inquiry.

Sections 6156-6171 of the Code of Alabama, 1923, relate to the subject of arbitration under the statutory law of this state.

In view of that part of your inquiry which contains the notice of appeal filed by the attorney for Bertram R. Scheuermann, which is as follows:

"* * * there being no suit pending involving the determination of the matters submitted and determined in said arbitration proceedings.",

I assume that the arbitration was made under the provisions of Section 6157 of the Code of Alabama, 1923, which is as follows:

"When no suit is pending, the parties to any controversy may refer the determination thereof to the decision of arbitrators, to be chosen by themselves; and the award made pursuant to the provisions of this chapter must be entered up as the judgment of the proper court, if the award is not performed."

I assume that the award of the arbitrators was not performed, in view of the fact that one of the parties is attempting to perfect an appeal to review the findings of the arbitrators.

Section 6161 of the Code of Alabama, 1923, is as follows:

"Return and effect of award; to what court returned.—

"If the award is not performed in ten days after notice and delivery of a copy thereof, the successful party may, if a suit be pending, cause the award and the file of papers in the cause to be returned to the court in which the suit is pending, or, if no suit is pending, cause the submission and award to be returned to the clerk of the circuit court of the county in which the award is made, if for the payment of more than fifty dollars, for the delivery of specific property, or to do or omit to do any particular act; if for fifty dollars, or less, then to a justice of the peace of the county; and, in either case, such award has the force and effect of a judgment, at law, upon which execution may issue as in other cases."

Section 6170, Code of Alabama, 1923, is the statutory provision authorizing either party to the arbitration to appeal to the Court of Appeals or Supreme Court. Said section is as follows:

> "Appeal to appellate court.—Either party may, however, within ten days after receiving notice of the award, file in the office of the clerk, register, or judge of the court in which the cause is pending, or, if no suit is pending, in the office of the clerk of the circuit court to which the award is returnable under the provisions of this chapter, a notice of appeal to the court of appeals or supreme court, and may tender to the arbitrators a bill of exceptions setting forth all the evidence in the cause, which, with the conclusions of law of the arbitrators and their award thereon, shall be certified by them or a majority of them, and returned with the file of papers, or with the submission, as the case may be, to the court to which the award is returnable; and either in term time or vacation, the clerk, register, or judge of the court may enter it up as the judgment or decree of the court, and it shall stand as the judgment or decree of the court, unless set aside for some of the causes specified in the preceding section, or for the failure or refusal of the arbitrators to certify a correct bill of exceptions as herein provided; and from the judgment or decree so entered up, or from the judgment setting aside the award, an appeal shall lie as in other cases."

Your inquiry No. 1 is as follows:

> "Should I place said proceedings on the docket as a case?"

I am of the opinion that you should not enter such proceedings on the dockets which you are required to keep under the provisions of Subsections 2 and 3 of Section 6724 of the Code of Alabama, 1923. When the submission and award are returned to the Clerk of the Circuit Court, the award becomes a judgment and it is my opinion that the clerk should record the proceedings in the book required to be kept by Subsection 8 of Section 6724, supra. The only specific reference which I have been able to find to the recordation of such proceedings is a provision in Section 7278, Code of Alabama, 1923, which section deals with the fees allowed to the Clerks of the Circuit Courts and wherein is found the following language:

> "Clerks of Circuit Courts are entitled to receive the following fees for the following services: * * * Recording the award of arbitrators, referees, auditors, etc., for each one hundred words, .15"

Your question No. 2 is:

> "Am I required to issue citation on appeals?"

My answer to this is in the affirmative. You will note the above section in its last clause says, "and from the judgment or decree so entered up, or from the judgment setting aside the award, **an appeal shall lie as in other cases.**" Therefore, citation of an appeal should issue.

Your third question is:

"To whom should I address citation in appeal?"

It is my opinion it must be issued to the adverse party as in other cases. See Section 6140, Code of Alabama, 1923, which is as follows:

"Citation on appeal.—Upon an appeal being taken, the register, or clerk of the circuit court, or the judge of probate, must issue a citation to the adverse party, returnable to the day to which the appeal is returnable, notifying him of the appeal, which must be served on him, or his attorney, or solicitor, at least ten days (unless otherwise provided) before the day to which the appeal is returnable."

Williams v. Harper, 95 Ala. 610, 10 So. 327.

Your fourth question is:

"Is appellant required to give security for costs of appeal?"

This question, in my judgment, should also be answered in the affirmative. I again refer you to that portion of Section 6170, supra, where it says: "an appeal shall lie as in other cases." The party appealing must give bond. See Section 6131, Code of Alabama, 1923, which is as follows:

"6131. Security for costs; when required.—An appeal may be taken without giving bond to supersede the execution of the judgment or decree, by the appellant giving security for costs of such appeal, to be approved by the clerk, register, or judge of probate; the names of the surety or sureties to be certified with the record to the appellate court; and execution may issue against such sureties for the costs in such court and the costs of the transcript, if decided against the appellant."

The State for the use of Fayette County v. Earnest et al., 123 Ala. 631, 26 So. 948.

Your fifth question is:

"Is it the duty of the clerk of the circuit court to make up the transcript for the Supreme Court?"

My answer to this question is also in the affirmative. I again call your attention to Section 6170, supra, where it says, "an appeal shall lie as in other cases." In other cases the clerk is required to make the transcript, therefore, the clerk would be required to make the transcript in appeals regulated by Section 6724, Code of Alabama, 1923, Subsection 15, which is as follows:

"To make out transcripts, as required by law, in all cases of appeal to the supreme court or court of appeals."

Your sixth request is:

"Am I required to make final record in such proceedings?"

My answer to this is in the negative. It is my opinion that the proceedings which you have in mind are not a "suit or prosecution" within the purview of Section 6724, Subsection 9, Code of Alabama, 1923, which is as follows:

"To record in well-bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under section 19129 (5736)) except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions."

Your seventh question is:

"If appellant is successful in the Supreme Court, who would be liable for the costs of the court?"

After the award has been returned to the Clerk of the Circuit Court and and appeal has been taken therefrom, the costs thereafter accruing are taxable as in other cases. The successful party is entitled to his costs unless provision is made otherwise by the court. Section 6170, Code of Alabama, 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 15, 1940.

Hon. Addie Lee Farish,
Superintendent of Banks,
State of Alabama,
Department of Commerce,
Montgomery, Alabama.

Banks and Banking — Branch Banks —

Bank organized under laws of Alabama, and lawfully operating at branch at this time, may legally sell property and assets pertaining to such branch and thereupon acquire property and assets of another bank at a location in this State other than at its principal place of business, and may operate a branch at the place where the bank whose assets it purchased was doing business.

Opinion by Assistant Attorney General Matthews.

Dear Miss Farish:

I have your letter of November 8, 1940, in which you request my opinion as follows:

> "This office has been consulted by the office of the Comptroller of the Currency of the United States regarding the State law on the legality of a proposed transfer of a branch bank from one locality to another, and I will be glad if you will give me your opinion on the following state of facts:
>
> "Suppose that a State bank has a branch located at point A, and desires to sell all of the assets of the branch at A, including the Banking House, to another bank at A, which is to assume the deposit liabilities of the branch bank at A, and the State bank desires to acquire all of the assets of another bank at B, including the Banking House of the bank at B, and to assume the liabilities of the bank at B, the assets of which it is purchasing.
>
> "Please advise me whether, in your opinion, Sections 6403 to 6408 of the Code of Alabama of 1923 authorize such procedure as being a change of location of the branch bank from Point A to point B."

Act No. 84, H. 213, approved March 2, 1911 (General Acts 1911, page 50) was passed, as expressed in its title, "to create a banking department of the State of Alabama and through this department to regulate, examine and supervise banks and banking, and to punish certain prohibited acts relating thereto." Its provisions now appear as Chapter 263, Sections 6275 to 6428, inclusive, of the Code of Alabama of 1923.

Section 28 of the Act on page 77, (Code, 1923, Sec. 6354) reads as follows:

> "From and after the passage of this Act, no bank, or any officer, agent or director thereof, shall be permitted to establish a branch or office for the transaction of the banking business, other than at its principal place of business."

Under Act No. 582, H. 946, approved September 29, 1919 (General Acts 1919, page 837), incorporated in the Code of 1923 as Sections 6403 to 6408, inclusive, provision is made for consolidation or merger of one bank or trust company with another bank or trust company, and also for the removal of the office or place of business of such banks or their branches from one city or town to another city or town within the State.

Said Section 28, supra, must be read and construed in connection with Sections 6403 to 6408, inclusive, supra, and a reasonable field of operation be accorded to all Sections, together constituting a part of the statutory law regulating the business of banking in Alabama.

The concluding sentence of Section 6408, supra, reads as follows:

> "This Article shall apply to banks having branches, and to any branch office thereof, in the same way as it applies to other banks."

Harmonizing, as best we may, the latter provision with the aforementioned Section 6354, and giving to each a reasonable field of operation, it follows that a bank in Alabama at this time legally operating a branch bank would have the right under Sections 6403-6408 to "consolidate or merge with, or transfer its assets and liabilities to another bank," and to move such branch so legally operating "from one city or town to another city or town within the State."

By the enactment of said Sections 6403-8, (General Acts, 1919, page 837), and incorporation thereof in the Code of Alabama, 1923, together with Section 6354, the Legislature evidently recognized the legal existence at that time of certain State banks in Alabama operating branch banks. See **Ex Parte Tennessee Valley Bank,** 231 Ala. 545, 166 So. 1, in which it was observed:

> "The Tennessee Valley Bank was a corporation with banking powers, and with its principal place of business at Decatur, Alabama. Under its charter, however, the bank conducted a banking business at numerous localities in North Alabama, a privilege considered of much value, particularly in view of the present inhibitions contained in section 6354, Code 1923, and a matter of importance in consideration of the question of a reopening of the bank upon reorganization."

Therefore, I am of the opinion that Sections 6403-8 of the Code authorize a State bank having a branch located at point A to sell all of the assets pertaining to such branch, including the banking house, to another bank at A, which is to assume the deposit liabilities of the branch bank at A, and authorizes such State bank to acquire all of the assets of another bank at point B, including the banking house of the bank at B, and to assume the liabilities of the bank at B, and thereafter to operate a branch bank at point B.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 15, 1940.

Hon. John T. Frazier,
Judge of Probate,
Lee County,
Opelika, Alabama.

Licenses — Electrical Repair Shops—

1. Whether or not a particular business constitutes the operation of an electrical repair shop presents a question to be determined by the facts of each case.

2. Dealer in electric or gas hot plates subject to license levied by Schedule 56 of the Revenue Act of 1935.

3. Dealer in electric washing machines, also operating shop catering only to repair of own washing machines, not subject to license levied by Schedule 56 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 18, 1940, in which you request my opinion as follows:

"Will you please clarify Schedule 56, Revenue Laws of Alabama, 1936. (sic)

"A number of stores in this city handle wires, light bulbs, sockets, electric irons, hot plates and electric percolators. The managers of such stores have been informed that if they do not sell hot plates and percolators, they will be exempt from license levied under Schedule 56. Is this true?

"The local ice plant intends to handle electric washing machines, repairing its own machines, if necessary, at the beginning of the new license year, October 1. Will this company be due a license under Schedule 56?"

Schedule 56 of Section 351 of the Revenue Laws of 1935 (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256, 460), concerning which you inquire, provides as follows:

"Schedule 56. For each dealer in electric, gas or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, and/or for each electrical or gas repair, or electrical or gas supply shop: (Here follows schedule of amounts to be paid)."

You will see from the foregoing schedule that, as applicable to your first inquiry, a license is imposed upon each "electrical supply shop." In every instance the question of whether a party is operating an electrical supply shop is one of fact which must be determined by you. Quarterly Report of Attorney General, Volume XIV, page 258. Of course, if the store in question is selling hot plates there would be no question of its liability for the license required by Schedule 56 which also levies a license on "each dealer in * * * electric or gas stoves." I doubt whether the mere fact that the store sold percolators would in and of itself bring it within Schedule 56, for I do not believe that percolators were within the legislative contemplation when it provided a license on a dealer in electric or gas heaters or electric or gas stoves.

This office has heretofore held that the mere fact that a person operating a place of business for the sale of general merchandise also handles electric light bulbs and floor and reading lamps would not cause him to be

liable for the license prescribed by Schedule 56. Quarterly Report of Attorney General, Volume VI, page 77. It has also been held that a hardware store selling electrical wiring supplies (electrical wiring fixtures) and electric irons is liable for the license under Schedule 56 even though such may not be its main line of business (Quarterly Report of Attorney General, Volume VI, page 65).

You will see, therefore, that, as hereinabove stated, each case must turn on its own particular facts.

While I cannot answer your inquiry categorically, you are advised that the mere fact that a store, such as a drug store, grocery store or furniture store, handles light bulbs, electric irons, sockets, fuses, etc., would not ordinarily render it liable for the license prescribed by Schedule 56. The question is one of degree, however, for if such stores dealt in electrical wiring supplies and fixtures, as distinguished from electrical appliances, as noted in the opinion in Quarterly Report of Attorney General, Volume VI, page 77, a license would be required by Schedule 56.

Answering your inquiry regarding the ice plant handling electric washing machines and repairing its own machines, you are advised that no license would be required for handling the electric washing machines. Schedule 56 imposes a license only on dealers in electric, gas or other mechanical refrigerators, heaters, water heaters or stoves.

Nor would a license be required of the company under Schedule 56 for repairing its own washing machines. This construction follows the conclusion of this office in an opinion found in Quarterly Report of Attorney General, Volume X, page 184, to the effect that a radio repair shop would not be subject to the license prescribed by Schedule 56, and you are accordingly advised that the words "electrical * * * repair * * * shop", as used in Schedule 56, do not apply to shops catering only to the repair of electric washing machines.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 16, 1940.

Hon. Leon E. Hall, Clerk,
Circuit Court, Pike County,
Troy, Alabama.

Fees — Circuit Clerks — Pike County. —

Circuit Clerk of Pike County entitled to commission of five percent (5%) on all witness fees which he collects and pays into the fine and forfeiture fund of said County (Local Acts 1919, page 138). Claim

of said Clerk for said commission is not barred by limitations imposed by Section 228 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 11, 1940, in which you request my official opinion as follows:

"Will you please give me your opinion as to whether or not I am entitled to 5% commission as provided by Sub-section 16 of Section 6724 of the Code of Alabama, 1923, on witness fees in Criminal cases collected by me and paid into the County Treasurer under Local Act of 1919, page 138.

"If you hold that I am entitled to this commission of 5%, would the same rule apply to my case where commissions have not been deducted during my tenure of office as that laid down in your opinion to Hon. D. F. Byrd, Treasurer, Dale County, Alabama, rendered on October 6th, 1939, and appearing on Page 36 of Volume 17 of Quarterly Report of the Attorney General of Alabama."

In answer to your first inquiry, I am of the opinion that the Clerk of the Circuit Court of Pike County is entitled to a commission of 5% on all witness fees which he collects and pays into the fine and forfeiture fund of said County.

Section 6724(16) of the Code of Alabama, 1923, provides as follows:

"6724. **Their duties.**—It is the duty of the Clerk of the Circuit Court * * * * 16. To render to the county treasurer, court of county commissioners, or board of revenue, within thirty days after each term of the court, a statement in writing and under oath, of the fines assessed and forfeitures obtained during such term, the amount of each, and against whom each was assessed or obtained, and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deducting from such amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds. * * * *"

In construing said Section with reference to the collection and remission of witness fees, this office, in an opinion rendered to the Judge of Probate, Clarke County, under date of September 27, 1939 (Quarterly Reports Attorney General, Vol. XVI, page 289), held that the clerks of the circuit courts are entitled to 5% commission on witness fees when same are collected and paid into a general or special fund of the county on the theory that the clerk is collecting money for the County, but that he is not entitled to the said 5% commission on witness fees when he collects same and pays the money over to the witnesses. This opinion was followed in a later

opinion of this office rendered to the County Treasurer of Dale County under date of October 6, 1939 (Quarterly Reports Attorney General, Vol. XVII, page 36).

Bearing in mind the above premise, the question presents itself as to whether or not the Clerk of the Circuit Court of Pike County, in collecting witness fees and remitting same into the fine and forfeiture fund of said County, is collecting for the County or for the witnesses. Act No. 343, S. 393, approved September 17, 1919, (Local Acts 1919, page 138), regulates the fine and forfeiture fund of Pike County and provides for the registration and payment of the claims against said fund. Sections 4 and 7 of said Act provide as follows:

"Section 4. All moneys collected as fines or forfeitures, contempts of court or process, for the hire of convicts from whatever source on account of convicts, and all moneys collected by the clerk of the circuit or county court, sheriff or other officer of said county on account of witness fees or solicitors fees in state cases, shall be paid into, and constitute the fine and forfeiture fund of said county. All fines and forfeitures shall be payable in lawful money of the United States, or registered claims against the fine and forfeiture fund of said county."

"Section 7. It shall be the duty of the Court of County Commissioners or like governing body of said county, on the first Monday in July and January of each year to ascertain the total amount paid out of the general fund of said county on account of witness fees, and fees and commissions of the clerk and sheriff of said county, beginning with the first payment so made, and order a warrant drawn against the fine and forfeiture fund of said county in favor of said general fund, which warrant shall be paid out of the fine and forfeiture fund into the general fund of said county."

Act No. 345, S. 392, approved September 17, 1919, (Local Acts 1919, page 149) provides for the payment of witnesses before the Grand Jury and before the Court in Criminal cases when the State fails to convict in Pike County, to be paid out of the general fund of said county.

From the foregoing it can be seen that the Clerk, in collecting and remitting witness fees, is collecting the witness fees for the County and not for the individual witnesses. Said fees are paid into the fine and forfeiture fund and certain witnesses are paid out of the general fund, which general fund is reimbursed to this extent from the fine and forfeiture fund.

In answer to your second inquiry, it is my opinion that the claims of the Circuit Clerk for 5% commission on witness fees collected by him and paid into the fine and forfeiture fund of said County are not barred by the limitations of Section 228, of the Code of Alabama, 1923. This is on the theory that this is a claim fixed by law and does not have to be itemized and presented to the County Governing body for approval and allowance, and therefore need not be presented within twelve months as required by Section 228, supra. — Quarterly Report Attorney General, Vol. XVI, page 289, supra;

Quarterly Report Attorney General, Vol. XVII, page 38, supra. It, therefore, follows that the rule pronounced in the opinion in the Quarterly Report, Vol. XVII, supra, referred to in your letter, is applicable to the situation in Pike County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 20, 1940

Hon. Ben M. Smith,
Brigadier General,
The Adjutant General,
State Military Department,
Montgomery, Alabama.

Corporations — Corporations of non-business character —

Deed from American Legion Post No. 17 to Armory Commission of Alabama examined and held to convey legal title in certain property pursuant to Sections 7167, 7169, 7172 of the Code of Alabama of 1923, as amended (General Acts, 1927, page 83), and to be in proper form.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of November 19, 1940 in which you request my official opinion as follows:

"Attached hereto is a legal instrument offered purporting to be a legal conveyance to the Armory Commission of Alabama of the National Guard Armory at Talladega, Alabama, by the present owner of that property.

"It is requested that you review this instrument and advise whether the same is in proper form to convey to the Armory Commission of Alabame the legal ownership of the property in question."

The document submitted for examination purports to be a deed executed the 18th of November, 1940, by Edward R. Wren, Post number 17 of the American Legion, Department of Alabama, a body corporate, conveying to the Armory Commission of Alabama certain real property therein described pursuant to a resolution adopted at a regular meeting of the members of said Post on the 14th of March 1940, by unanimous vote of all members present, at which there were present a majority of the adult members of said Post.

It further appears that the grantor is a corporation duly organized under Section 7167 of the Code of Alabama of 1923 as amended by Act No. 119, H. 124, (General Acts, 1927, page 83.).

Under Section 7169 of said Code such corporations may acquire and hold real and personal property and exercise such other powers as are incident to private corporations.

Section 7172 of said Code as amended by Act No. 119, supra, so far as pertinent, reads as follows:

> "The trustees or other authorized agents of any church * * * or other corporation organized under Section 7167 of this Article, may sell and convey all or such part of the property thereof, real or personal, as they may be authorized to do by resolution of the church * * * or other corporation assembled at a regular meeting or special meeting, * * * ."

It is to be noted that notice of such regular meeting is not required to be given, although ten days notice of special meetings for such purposes is required.

The aforementioned deed and the resolution incorporated therein show that the three trustees of the grantor corporation were duly authorized at the meeting aforesaid to execute and that they have executed said deed to said Armory Commission.

I am of the opinion, therefore, that, assuming the legal incorporation of the grantor (as to which I am not prepared to express an opinion in the absence of a certified copy of its articles of incorporation), the document submitted meets the requirements of the statute in such case made and provided and conveys a fee simple title to the Armory Commission in and to the real property therein described.

In the absence of an abstract of title I am not prepared, of course, to pass on the title to said property. I am returning herewith the deed submitted for examination.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 25, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses — Mule Dealers —

A licensed automobile dealer who occasionally accepts mules as a partial down payment on the sale of trucks or automobiles and resells same is not "engaged in the business of buying, selling or exchanging horses, mules, jacks or jennets" within meaning of Schedule 72 of Section 348 of Revenue Act of 1935 (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 9, 1940, in which you request my official opinion as follows:

"Please advise me your opinion on the following question:

"We have a licensed Automobile Dealer in this county that accepts mules as partial down payment on trucks and cars. He then sells these mules in order to get his money out of the cars and trucks. Is he liable for a license under Schedule 72, of the 1935 Revenue Acts?"

An answer to your request necessitates a consideration of Schedule 72, General Revenue Law of Alabama, 1935 (General Acts 1935, page 256), which is as follows:

"Schedule 72. Each person engaged in the business of buying, selling or exchanging horses, mules, jacks or jennets, shall pay a license tax of twenty dollars ($20.00) in each county, where such person engages in said business."

The question depends on what is the meaning of the words "engaged in the business of" as used in Schedule 72, supra. In the case of **State v. Levy Loan Company, et al.**, 25 Ala. App. 514, 149 So. 714, the Court of Appeals held that a pawnbroker, who receives pistols in pledge, purchases pistols at pawnbroker's sale, and re-sells them, is not a dealer in pistols within license statute, requiring a license of persons dealing in pistols. Quarterly Report of Attorney General, Volume XIV, page 157; Quarterly Report of Attorney General, Volume VI, page 94.

It is my opinion that a party would not come under Schedule 72, supra, for the occasional sale of a mule acquired in the manner set out above.

However, an extensive practice of doing business in this manner may, under certain circumstances, render one liable for the license required by Schedule 72, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 25, 1940.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

1. Licenses — Hotels —

Person keeping boarding house where boarders stay for a week or longer is not "engaged in the business of keeping a hotel" within Schedule 74 of the Revenue Laws of 1935.

2. Licenses — Schedule 123½, General Acts, 1936-37, page 279—

Person operating a "shop" for the repair of furniture is not, under facts stated, operating a "mill or factory" as contemplated by Schedule 123½.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion of November 19, 1940, is as follows:

"Will you kindly render an opinion on the following:

"Schedule 74 — Whether or not a boarding house where boarders stay for indefinite periods, such as, a week, two weeks, months or years, and pay one amount for room and board, and which boarding house does not maintain rooms for rent for transient guest and which boarding house does not serve meals to the general public is liable under this schedule.

"Schedule 123½ — Whether or not a person is liable under this schedule who only maintains a shop for the repair of furniture, and merely repairs and replaces parts of said furniture from material."

Replying to your first inquiry, you are advised that, under the facts stated, such a boarding house would not be liable for the license imposed by Schedule 74 of the Revenue Act of 1935, Act No. 194, H. 328, approved July 10, 1935 (General Acts, 1935, page 256). This Schedule is as follows:

"Schedule 74. Each person keeping a public inn or lodging house of five or more bed rooms where transient guests are lodged for pay shall be deemed for the purposes of this Act to be engaged in the business of keeping a hotel. A transient guest is one who puts up for less than one week at such hotel, but such a house is no less a hotel because some of the guests put up for longer periods than one week. Every person keeping a hotel as defined in this section shall pay an annual license tax as follows: Hotels with five rooms and not over fifteen rooms, fifty cents for each room; hotels with over fifteen and less than fifty rooms, one dollar ($1.00) for each room; hotels with fifty rooms and less than one hundred rooms, one dollar and fifty cents ($1.50) for each room; hotels with one hundred rooms and over, two dollars ($2.00) for each room. If meals, food or refreshments are served to the general public and charged for, then the additional license required to be paid by restaurants, cafes, lunch counters and public eating houses shall be paid. Provided that where cottages or annex are operated in connection with, or rented by, such hotel the above schedule shall apply to the total of the rooms in the hotel and the cottages and annex."

This office has heretofore held that a public inn or lodging house becomes a hotel within the meaning of the schedule when it contains "as many as five rooms in which 'transient guests are lodged for pay'". Quarterly Report of Attorney General Vol. V, page 104, 106. The schedule, it will be noted, defines a "transient guest" as "one who puts up for less than one week at such hotel."

Since, as stated in your request, the boarding house in question caters to persons who stay for periods of from one week to a longer period of time, it is apparent that "transient guests" are not lodged at such boarding house. Therefore, since the boarding house in question is not keeping "transient guests," it is not a "hotel" and therefore not subject to the license prescribed by Schedule 74.

Cf: Biennial Report of Attorney General, 1926-28, page 651.

This would not be true if such boarding house accepted guests for periods of time of less than one week.

With respect to your second inquiry, I assume that by "Schedule 123¼" you refer to "Schedule 123½" which was added to Section 348 of the Revenue Act of 1935 by Act No. 231, H. 182, approved March 2, 1937 (General Acts, 1936-37, page 279), for I find no "Schedule 123¼" in the statutes of this State.

If my assumption is correct, you are advised that it is my opinion that a person maintaining a shop for the repair of furniture whose only operation is the repairing and replacing of parts of furniture from materials on hand is not subject to the license imposed by Schedule 123½. This Schedule is as follows:

"Schedule 123½. Each person, firm or corporation engaged in the operation of a veneer mill, planing mill, box factory, handle factory, or any other factory where lumber or timber is sawed or made into a fin-

ished or semi-finished product, other than a saw mill licensed under Schedule 123, shall pay a privilege tax based on the number of men employed or engaged in the manufacture of the products produced by such mills, as follows:

"Where there are 5 or less men employed or so engaged ..... $ 5.00

Where there are more than 5 men and less than 10 so employed or engaged 10.00

Where there are more than 10 men and less than 20 so employed or engaged 30.00

Where there are more than 20 men and less than 40 so employed or engaged 80.00

Where there are more than 40 men and over 120.00

"It is the intention hereof that where a person, firm or corporation shall pay a privilege tax under Schedule 123 or under Schedule 84, then no privilege license shall be charged or collected hereunder."

You will note that the schedule does not attempt to levy a license upon persons maintaining "shops," but rather places the license on persons, firms or corporations engaged in the operation of "mills or factories" where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill, which is licensed under another schedule.

Under the facts which you submit it appears that the person in question operates a "shop" rather than a "mill or factory," and, in my opinion, such an operation is not contemplated by the schedule. Cf. Quarterly Report of Attorney General, Vol. XX, page 137.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 25, 1940.

Hon. Luther H. Waller, Member,
House of Representatives,
Montgomery County,
Montgomery, Alabama.

Sales Tax — Exemptions —

1. The sale of machinery when sold as an "occasional sale" held not subject to sales tax.

2. Machinery used in the manufacture of tangible personal property and installed as a part of the manufacturing plant held not subject to sales tax.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion under date of November 12, 1940, is as folllows:

"Please advise if 2% sales tax should be collected upon a sale made under the following circumstances:

"A company purchased a used piece of machinery and a used motor to drive it, retained such machinery and motor in its plant for a period of about 60 days and then sold such machinery and motor to a third party who installed it in a manufacturing plant and which machinery is now in daily use.

"It is contended that the purchaser of this used machinery did not have to pay a 2% State Sales Tax as such machinery was purchased for installation in his factory and to become a part of his plant."

In reply I wish to refer you to Section 2 of Act No. 126, H. 179, approved February 23, 1937 (General Acts, 1936-37, page 125), which provides in part as follows:

"Section 2. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm or corporation engaged or continuing within this State in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, (not including, however, bonds or other evidences of debt or stocks) an amount equal to two per cent of the gross proceeds of sales of the business, except where a different amount is expressly provided herein. Provided, however, that any person engaging or continuing in business as a retailer and wholesaler or jobber shall pay the tax required on the gross proceeds of retail sales of such business at the rates specified, when his books are kept so as to show separately, the gross proceeds of sale of each business, and when his books are not so kept he shall pay the tax as a retailer, on the gross sales of the business. * * *"

This Act, which is generally known as the Sales Tax Act of 1937, was superseded by Act No. 18, H. 82, approved February 8, 1939 (General Acts, 1939, page 16).

The pertinent part quoted from the Acts of 1936-37 supra, was rewritten into the 1939 Act without change as a part of Section II thereof. Under date of May 12, 1937 the Attorney General construed the above quoted provisions of law in an opinion reported in the Quarterly Report of Opinions of The Attorney General, Volume VII, page 126, to be a tax upon sales made as a part of the regular course of business. In this opinion it was held that such tax is not imposed upon sales which are not made as a part of the regular business of the seller, such sales being considered as "occasional sales" not in the regular course of business.

While it must be understood that the courts are not bound by such circumstances it is nevertheless true that the courts will give great weight to administrative construction by those charged with the duty of construing and administering the law. **Macon County v. Abercrombie,** 184 Ala. 283, 63 So. 985. **Waters v. State,** 25 Ala. App. 144, 142 So. 113. **State Board of Administration v. Jones,** 212 Ala. 380, 102 So. 626. **State v. Tuscaloosa Building and Loan Association,** 230 Ala. 476, 161 So. 530, 99 A.L.R. 1019.

You do not state in your statement of facts whether the sale of the machinery named constitutes a part of the regular business of the seller or whether it was such sale as must necessarily be classified as an "occasional sale."

It suffices to say, however, if such sale is properly classified as an "occasional sale", it is my opinion that no sales tax can or does become due as a result of the transaction.

If, on the other hand, the sale involves goods which are a part of the stock or if such sale is in the regular course of the business of the seller, it must become subject to the tax unless a specific exception is found in the law.

I note the contention set out by you that the machinery in question is claimed free of tax because it is to be used in a factory and as a part of the manufacturing plant. I assume that this contention is founded upon the exemption contained in Section V of the Sales Tax Act of 1939, supra, which provided in part as follows:

> "Section V. EXEMPTIONS. * * * (r) The gross proceeds of the sale of machines used in mining, quarrying, compounding, processing and manufacturing of tangible personal property; provided that the term 'machines', as herein used, shall include machinery which is used for mining, quarrying, compounding, processing or manufacturing tangible personal property, and the parts of such machines, attachments and replacements therefor, which are made or manufactured for use on or in the operation of such machines and which are necessary to the operation of such machines and are customarily so used."

Section I of the same Act provides in part as follows:

"Section 1. DEFINITIONS. * * * (j). The term 'sale at retail' or 'retail sale' shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. * * * Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. * * *"

Exemptions must be strictly construed in favor of the taxing authority. **State v. Tuscaloosa Cotton Seed Oil Company,** 208 Ala. 610, 95 So. 52. The exemption quoted supra must necessarily be construed with the pertinent provisions of Section I quoted supra, since the language of said Section I, when read alone, apparently conflicts with the exemption herein quoted. **Hawkins v. Peoples Finance and Thrift Company,** 219 Ala. 558, 122 So. 650.

Considering the Act as a whole, consideration must be given to the meaning of the provisions of Section I quoted above. It is my opinion that the machinery named by you, as well as the motor used to drive it, comes within the specific provisions of the exemptions set out in Section V of the Act heretofore quoted.

It is further my opinion that the provisions of Section I quoted supra, are not intended to include the machinery or necessary attachments and replacements for such machinery when used for the purpose of manufacturing tangible personal property, as described in Subsection (r) of Section V, supra.

In my judgment, Section I, supra, contemplates products or materials necessary to aid in the manufacture of tangible personal property but no part of the machinery itself, even though such parts of the machinery may be consumed in the manufacturing process by natural wear and tear.

Premises considered, it is my opinion that the machinery considered in your request is not subject to the 2% sales tax named.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 25, 1940

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools — Teachers — Teacher Tenure Act — Notice —

A letter addressed to a teacher advising that he was being considered for a vacancy and further advising that notices had been mailed to those not reemployed, in accordance with the provisions of the Teacher Tenure Act, held to constitute "legal notice."

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter for official opinion under date of November 8, 1940, is as follows:

"Your opinion is requested on the following question:

"Does the letter quoted below constitute a legal notice to a teacher receiving such notice that said teacher was not re-employed for the year 1940-41, in accordance with Section 10 of Act No. 499, S. 468, approved September 21, 1939 (General Acts, 1939, page 759) generally referred to as the 'Teacher Tenure Act?'

" 'Mr. Thos. D. Brooks March 28, 1940.
Hamilton, Alabama

Dear Mr. Brooks:

" 'We had a few teachers in the county who did not receive the recommendation of the principal and the local Board of Trustees where they taught this past year.

" 'The Teacher Tenure law makes it the duty of the County Board of Education to notify each and every teacher by the last day of their school or not later than May 1st as to whether or not they are employed for the 1940-1941 school term. The County Board of Education met Friday, March 22, 1940, and employed those who had been recommended by the principal and trustees and these were mailed a notice stating that they were employed. Those who had not been recommended by their principal and trustees of the school where they taught this year, were not employed at that time and they were sent a notice that they were not employed for the 1940-41 school term.

" 'We did not have time to go over the list carefully and make placements of those who had not been recommended and it was

necessary according to the Teacher Tenure Act to give notice that they were not employed or all of them would have been automatically re-employed at the salary they received this year.

" 'We still have about thirty vacancies and you are to be considered for one of these vacancies.

Yours very truly,

(Signed) Ross V. Ford

Superintendent of Education' "

In reply, I wish to call your attention to the provisions of the statute under consideration found in Section 10 thereof, which states in part as follows:

" * * * shall cause notice in writing to be given said teacher * * *."

The first question for determination must necessarily be, what manner of notice shall be given. The letter forming the basis of your request states that notices were mailed to those who were not reemployed, but further advises the addressee that he is being considered for a vacancy existing in the county. Is this notice ipso facto such notice to the addressee as would inform him that he was not reemployed? The courts have held that any fact which would put an ordinarily prudent person on inquiry is notice of all that such inquiry might disclose. **Gamble v. Black Warrior Coal Company,** 172 Ala. 669, 55 So. 190; **Alexander v. Fountain,** 195 Ala. 3, 70 So. 669; **In Re Scruggs Brothers,** 252 Fed. 322; **Figh v. Taber,** 203 Ala. 253, 82 So. 495; **Home Bond and Mortgage Corporation v. Alabama Utilities Service Company,** 225 Ala. 322, 142 So. 827.

The letter in question refers to prior notices sent advising of termination of employment, but further informs the addressee that he is being considered for vacancies which still exist in the county. Assuming that no other notice has been sent to or received by the addressee of the letter in question, it is my opinion that sufficient notice that this teacher will not be expected to continue in his last occupied position is found in the statement that he is being considered for an existent vacancy. This fact alone, in my judgment, would necessarily invite inquiry on the part of the teacher.

My position here is strengthened, however, by the fact that the letter further states that the writer of the letter had not at the time of writing, gone over the entire list of teachers not reemployed to fill the vacancies, but was at that time considering the addressee for such a place.

In my judgment, sufficient notice was contained in this letter to put this teacher upon inquiry. This inquiry then must be construed to be notice of the facts which such inquiry, if pursued, would have disclosed.

I am cognizant of the rule that the duty to inquire must rest upon the person receiving notice before he is bound to pursue the matter because of the knowledge brought to him from the notice received. **Hodges v. Coleman,** 76 Ala. 103; **Gill v. More,** 200 Ala. 511, 76 So. 453.

In my judgment, the letter set out in your request is vague, indefinite and ambiguous, nevertheless there is sufficient notice contained therein to advise the teacher in question that something concerning whether or not he would be expected to continue to teach in his last filled position was meant to be the subject of the letter received by him. In my judgment, he would necessarily be put upon sufficient notice to compel inquiry on his part. It is my opinion that sufficient facts are disclosed by the letter to the teacher in question to make it the duty of the teacher to inquire concerning his employment status, and such teacher would necessarily be charged with the information which he would receive upon making such inquiry.

The premises considered, it is my opinion that the letter set out in your request constitutes legal notice to the teacher receiving the said letter that the said teacher was not reemployed for the year 1940-41, as provided for by law. Cf. Opinion of the Attorney General reported in Quarterly Report of Attorney General, Volume XX, page 221.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 26, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Court of County Commissioners—Authority to appropriate county funds—

A Court of County Commissioners or other like governing body of a county may not legally appropriate county funds for the purpose of defraying the expenses of a dedication of a bridge.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of November 8, 1940, in which you request my opinion as follows:

"Please give me your opinion on the following question.

"Can the County legally appropriate money for dedication purposes of bridges? We are participating in the building of a bridge at Tallassee, Alabama, with the State and Federal Government and the citizens are calling upon our county for a donation to help in the Dedication expenses. Your prompt attention will be greatly appreciated."

My answer to your inquiry is in the negative. County governing bodies are creatures of the Legislature, and have no authority save that expressly or by fair implication delegated by their creator. **Edward v. Williams,** 70 Ala. 146; **State v. Street,** 117 Ala. 203, 23 So. 507; **Woodruff v. Beeland,** 220 Ala. 652, 127 So. 235.

I find no authority either expressed or implied which authorizes a county governing body to appropriate county funds for the purpose of defraying expenses for the dedication of a bridge. I do not think that the powers conferred on county governing bodies incident to the construction and maintenance of roads and bridges can be exercised so as to authorize such an expenditure.

You are therefor advised that, in my opinion your county may not legally appropriate county funds for this purpose.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 28, 1940

Hon. Wm. J. Kern, Clerk,
Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

The Sheriff of Mobile County and his deputies, when testifying in a criminal case, are entitled to their per diem and mileage as other witnesses.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion of November 19, 1940 is as follows:

"I should be grateful to you for rendering me an early opinion as to the following:

"Effective December 1st., 1940, the Sheriff of Mobile County and his entire force of deputies and employes go on a salary basis paid out of the treasury of Mobile County—Local Acts 1939—House Bill 598—page 355. Thereafter, will he, or his deputies be entitled to receive attendance witness fees of .50 per diem as heretofore, or should such fees if, or when collected as part of court costs be paid into the treasury of Mobile County? I might add further, as are such fees which are made in Alabama Highway Patrol cases which are paid into the Treasurer of the State of Alabama for the use of Alabama Highway Patrol Fund?

"As the time is soon approaching I should be grateful as I have said for your early opinion, for which I beg to thank you in advance, and too, for your many other valuable opinions which I assure you have greatly aided me."

In my opinion, the Sheriff and his deputies of Mobile County are individually entitled to their per diem and mileage when called to testify in a criminal case, as are other witnesses. I realize that the Sheriff of Mobile County and his Deputies, will be placed on a salary on the first day of December, 1940. This is done by Act. No. 594, H. 1044, approved June 28, 1940, (Local Acts, 1939, page 355) and Section 2 of said Act provides as follows:

"Section 2. That when this Act goes into effect said Sheriff of Mobile County shall continue to collect all charges, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, and shall, during the last five (5) days of each calendar month pay into the County Treasury of Mobile County, Alabama, all such monies received or collected by him during the month or part thereof, next preceding the date of such settlement or payment."

You will note that Section 2, above quoted, provides among other things as follows:

"That when this act goes into effect said sheriff of Mobile County shall continue to collect all charges, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, and shall pay the same into the county treasury of Mobile County."

It is my opinion the above section has reference to the legal fees and charges provided by law which are collected by the Sheriff for performing his official duties and has no reference to compensation of the Sheriff or his deputies when performing a duty as a witness in his individual capacity. Officers when attending court as a witness in a criminal case are not performing an official duty. In other words, these are duties performed which are not required of them officially. Therefore, when they are summoned to attend court as a witness in a criminal case they are performing an individual service whether they be on a salary or fees. **Quarterly Report of Attorney General, Volume III,** page 35.

Biennial Report of Attorney General, 1936-38, page 443.

Biennial Report of Attorney General, 1930-32, page 179.

Biennial Report of Attorney General, 1934-36, page 223.

The opinion in **Quarterly Report of Attorney General, Volume III,** at page 35, heretofore cited, dealt with witness fees of the Sheriff of Montgomery County and his deputies, which Sheriff is on a salary basis. It appears to me that such opinion is directly in point with the conclusion here reached.

If the Local Act of 1939 supra, had provided that in case the Sheriff or his deputies were summoned to testify and did testify in a criminal case it would be their duty to prove their attendance and turn same into the county treasury along with other fees, the rule would have been different.

This office has held this to be true in a number of opinions with reference to members of the Highway Patrol as the law creating the Highway Patrol provides that when a patrolman testifies in a case he cannot individually collect his per diem and mileage but must prove his attendance and that this must be collected and forwarded to the State Treasury, and credited to the Highway Patrol Fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 29, 1940

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Highways — Highway Department — Bids —

There is no requirement that bids submitted to the Highway Department for highway work be opened in the City of Montgomery.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 25, 1940, in which you request my opinion as follows:

"Re: Letting of Highway Department Contracts.

"Please advise this Department if it has the authority to open bids on a properly advertised letting in towns other than Montgomery.

"In other words, would this Department have the authority to advertise for bids on a certain job, and state therein that the bids would be opened at a time and place specifically designated therein, in some City other than Montgomery, but in Alabama."

I am of the opinion that your inquiry should be answered in the affirmative.

The only statutory provisions relative to advertising for bids for highway work, in so far as the Highway Department is concerned, that I have been able to find are Sections 25 and 26 of Act No. 347, H. 391, approved August 23, 1927 (General Acts, 1927, page 348), known as "The Alabama Highway Code," and Section 1 of Act No. 540, H. 369, approved September 13, 1935 (General Acts, 1935, page 1146).

Section 25 and 26 of the 1927 act, supra, provide as follows:

"Section 25. ADVERTISEMENT FOR BIDS: HOW MADE. Whenever it is proposed to do such work by contract and the estimated cost of such work exceeds five thousand dollars, the State Highway Department shall advertise for bids for at least thirty days in advance of the award of the contract in a newspaper published in the city of Montgomery and in a newspaper published in the county where the work is to be done, and in any other newspaper or periodical if the Department deems such other publication necessary and shall receive bids for all or a part of said work and let the contract to the lowest responsible bidder."

"Section 26. PROPOSALS FOR GENERAL WORK: HOW ADVERTISED. When proposals are asked for doing work of a general nature over the State it shall not be necessary for advertisement to be inserted in papers in each county, but the Department must advertise in at least three daily newspapers published in the State for at least two weeks. It shall receive the right, however, to reject any and all bids and call for new bids, or perform the work or any part of said work by day labor or convict labor or by entering into a contract with the Convict Department of the State to do such work or labor as it may deem best for the interest of the State and the County."

Section 1 of the 1935 Act, supra, provides as follows:

"Section 1. Before entering into any contract for a public improvement, the awarding authority shall advertise for bids for two consecutive weeks in a newspaper of general circulation in the county or counties in which the improvement or undertaking, or some part thereof, is to be made; the awarding authority may also advertise in such other publication as it may deem advisable. Such notices shall state that plans and specifications for the improvement are on file in the office of the authority, and the time in which the bids therefor will be received."

The term "awarding authority" as used above includes the State Highway Department under the specific provisions of Section 14 of said 1935 act.

It will be seen from the above that there is no requirement that bids received by the Highway Department are required to be opened in the City of Montgomery. The provision in Section 25 of the 1927 act, supra, as to advertising in newspapers published in the City of Montgomery is not, in my judgment, tantamount to a requirement that the bids be opened only in said city.

I am informed that there have been no rules or regulations promulgated by the Highway Department in regard to the matter of your inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 4, 1940.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Attorneys — Licenses —

Attorneys-at-Law held authorized to practice law in one or more counties of the State upon the payment of the license provided for by Schedule 10 of the Revenue Act of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256), and as provided for by Act No. 551, S. 329, approved September 19, 1939 (General Acts, 1939, page 871).

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion under date of November 23, 1940, is as follows:

"Will you please give me an opinion on the following question: Does a lawyer have to secure a license for each county that he practices law in?

"If he had an office in more than one county would that make any difference?

"The acts of 1935 as amended by an act of the Legislature of 1939, says that if an attorney practices law in the State of Alabama he shall secure a license which license cost $25.00 for the state.

"The question has been raised here as to whether this license entitled the lawyer to practice in all counties of the state or just in one county."

In reply, I wish to refer you to Act No. 551, S. 329, approved September 19, 1939 (General Acts, 1939, page 871), which provides in part as follows:

"Section 11: License Fee. Every Member of the State Bar shall, prior to the first day of October in each year in the same manner as required by law for the payment of license fees, pay as a license fee the sum of Twenty-Five ($25.00) Dollars, but no license shall be paid to the County."

A comparison of the above provision of law with Schedule 10 of the Revenue Act of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256) which provides in part as follows: "Each attorney engaged

in the practice of law shall pay an annual license of Twenty-Five Dollars ($25.00) to the State, but no license shall be paid to the County" discloses that no license for the county is provided by either Act. A State license of $25.00 is levied by the above cited 1939 Act, and an examination of the two Acts quoted above discloses that the amount of the license is the same as that levied under Schedule 10 of the Revenue Act cited supra.

Answering your questions in the order asked, it is my opinion that a lawyer is required to secure a license to practice law in the State, but is not required to secure a license for each county in which he may practice.

Concerning your second inquiry, it is my opinion that the amount of license insofar as the State and counties are concerned is not affected by reason of the maintenance of offices in more than one county of the State.

Premises considered, it is my opinion that only one license of $25.00 is required to entitle a lawyer to practice law in any or all counties in the State of Alabama.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 4, 1940.

Hon. A. H. Collins,
State Superintendent of Education,
The Capitol,
Montgomery, Alabama.

Schools — Teacher Tenure Act — Mobile County — Section 270 Constitution of 1901 —

The provisions of Act No. 499, S. 468, approved September 21, 1939, Gen. Act, 1939, page 759, held applicable to Mobile County.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated November 22, 1940 follows:

"Your opinion is requested on the following question: Do the provisions of Act No. 499, approved September 21, 1939, apply to the teachers of Mobile Sounty?"

My answer to your inquiry is in the affirmative.

The sole question presented in the above inquiry is whether or not Act No. 499, S. 468, approved September 21, 1939, Gen. Acts, 1939, page 759, commonly referred to as the Teacher Tenure Act, is applicable to Mobile County in view of the provisions of Section 270 of the Constitution of 1901. Said section reads as follows:

> "270. The provisions of this article and of any act of the legislature passed in pursuance thereof to establish, organize and maintain a system of public schools throughout the State, shall apply to Mobile county only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation as now authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature; provided, that separate schools for each race shall always be maintained by said school authorities."

In an opinion rendered to Hon. W. H. MacGregor, Secretary-Treasurer, Teachers' Retirement System, based upon the authority of the case of **Graham vs. City of Mobile,** 17 Ala. App. 19, 81 So. 355, I held that the provisions of Act No. 419, S. 362, approved September 15, 1939, Gen. Acts, 1939, page 559, commonly referred to as the Teachers' Retirement Act, were applicable to Mobile County, and said act was not in conflict with Section 270 of the Constitution.

Act No. 419, supra, provides for a retirement system of the teachers employed in the public schools of the State of Alabama, Act. No. 499, here considered, provides for the tenure in office of the teachers employed in the public school system of the State. In legal effect, I can see no difference, in so far as Mobile County is concerned, between Act No. 419, supra, and Act No. 499, supra.

On the authority of the Graham case, supra, and in view of the fact that I have heretofore ruled that Act No. 419, supra, applies to Mobile County as well as to the several other counties of the State, it is my opinion that Act No. 499, supra, likewise applies to Mobile County as well as to the several other counties of the State, and said act is not an act passed by the Legislature of this State to "establish, organize and maintain a system of public schools throughout the State."

For your convenience, I am enclosing a copy of the opinion rendered to Mr. MacGregor hereinabove referred to.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 4, 1940.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Deed Filing Tax — Deed by Mortgagors to owners of mortgage under will of deceased mortgagee—

Deed executed by mortgagors to others holding legal title to the mortgage under the will of the deceased mortgagee not subject to the deed filing tax (Revenue Act, 1935, Section 348, Schedule 46—Gen. Acts, 1935, p. 456); provided the value of the property so conveyed does not exceed the amount of the mortgage debt, and the mortgage filing tax was paid upon the record of the mortgage. (Revenue Act, 1935, Section 348, Schedule 94 — Gen. Acts, 1935, p. 477).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated October 31, 1940, follows:

"The firm of Steiner, Crum and Weil filed in this office on October 25, 1940, a deed which recites that 'on, to wit, April 3, 1929 Harry S. Houghton and his wife for the consideration of $17,911.33, sold and by deed conveyed to Clarence Cromwell real estate situated in the County of Montgomery, State of Alabama, and to secure the said consideration and simultaneously with the execution of this deed, Clarence Cromwell executed and delivered to Harry S. Houghton a mortgage executed by himself and wife, Eloise P. Cromwell, on said real estate. Whereas, the mortgage is past due and the indebtedness evidenced and secured by notes now exceeds the sum of $22,000.00, and greatly exceeds the value of said real estate. Clarence Cromwell and his wife, in order to avoid the expense of a contemplated foreclosure, and of being relieved of personal liability for the indebtedness or any part thereof, reconvey said property to the beneficiaries under the will of Harry S. Houghton, now deceased, and the heirs pursuant to the provision of said will in lieu of said foreclosure release and relinquish all statutory and other rights.'

"This office regarded this as a deed in lieu of foreclosure and Steiner, Crum and Weil stated the value thereof was $18,000.00, upon which we collected $18.00 deed tax, paid by Steiner, Crum and Weil under protest. They now present to this office a letter dated October 28, 1940, signed by you as Attorney General, by the Assistant Attorney General James F. Matthews, and ask for refund of the $18.00.

"Will you please advise me by an official opinion if this paper so outlined is taxable as a deed in lieu of foreclosure or should this paper be received without deed tax?"

From the foregoing statement, and in the absense of a copy of the will therein referred to, it is assumed that title to the mortgage in question was vested in the beneficiaries under the will, and that said beneficiaries had the right therefore to foreclose said mortgage, and instead of foreclosing accepted from the mortgagor a deed conveying all their right, title, interest and estate in and to the mortgaged property.

In other words, the beneficiaries stand in the shoes of assignees of the mortgage by reason of the provisions of the will.

It does not appear whether the mortgage filing tax imposed by Schedule 94 of Section 348 of the Revenue Act of 1935 (Gen. Acts 1935, p. 477) has been paid, but assuming such payment to have been made, the instrument now considered comes within the opinion of this office dated March 17, 1939, rendered to you (Quarterly Reports, Attorney General, Vol. XIV, p. 208), to wit:

> "Deed given by mortgagor to mortgagee is subject to filing tax on value of property conveyed in excess of mortgage, provided the original mortgage is filed and lawful filing tax was paid thereon."

Inasmuch as it appears from your request that there was no excess value of the mortgaged property over and above the amount of mortgage debt, it follows that no deed filing tax was payable upon the record of the mortgagors' deed, in lieu of foreclosure, to the owners of the mortgage, to wit, the beneficiaries under the mortgagee's will.

In this connection, attention is called to a paragraph in the opinion to yourself of March 17, 1939, supra, reading as follows:

> "Pursuant to the above, this office has held that the filing tax is based upon the value of the interest conveyed at the date of the execution of the deed. **Biennial Report of Attorney General, 1928-30, page 210; Quarterly Report of Attorney General, Volume I, page 56.** Therefore, it is my conclusion that a deed filing tax should be paid by the grantee in question on the value he receives in excess of his mortgage. Accordingly, if the value of the interest conveyed does not exceed the amount of the mortgage, it is my opinion that the mortgagee is not liable for a deed tax."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 9, 1940.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Licenses — Advertising and Bill Posting —

1. Company engaged in business of bottling and selling beverages, which buys Neon signs advertising such beverages, designed for display on the back of automobiles, and leases space from taxicab company on back of taxicabs for the purpose of displaying such signs, not liable for the license for advertising and bill posting levied by Schedule 23 of the 1935 Revenue Act.

2. Taxicab company which displays such signs on the back of its taxicabs not liable for said license.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion bearing date of November 28, 1940, is as follows:

"Please give me an opinion on the following case:

"The Blank Bottling Company of Leeds buys several neon signs displaying an advertisement of the beverage they bottle and sell. These signs are designed for display on the back of automobiles. The Blank Bottling Company leases from the local taxicab company the space on the back of their cabs and attach thereon the signs advertising the product of the Blank Bottling Company only. No advertising agency or third party is in any way concerned in these transactions, which is similar to leasing a space on a wall, lot, storefront or roof.

"Would either of the above mentioned parties be liable for license under Schedule 23, Revenue Laws of Alabama?"

In my opinion your inquiry should be answered in the negative, that is, neither of the parties or companies described in your letter of inquiry would be liable for the license levied by Schedule 23 of the 1935 Revenue Act (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256, 448). Said schedule reads in pertinent part as follows:

"Schedule 23. All bill posting and advertising companies displaying advertisement in public places, including street cars and each person engaged in the business of advertising or bill posting: (Then follows the license scales based on the population of counties in which the business is conducted)."

As can be seen from the above quoted excerpt, the license levied by said schedule is levied on (1) all bill posting and advertising companies displaying advertisement in public places, and (2) each person engaged in the business of advertising or bill posting.

Certainly, neither the bottling company described in your letter of inquiry nor the taxicab company described therein could be said to be a bill posting and advertising company. Consequently, if either of them is liable for the license levied by said schedule, it is because of the fact that it is "engaged in the business of advertising or bill posting."

Under the decisions of our appellate courts and opinions of this office on analogous questions, it is my opinion that neither of these companies is "engaged in the business of advertising or bill posting." The bottling company is engaged in the business of bottling and selling beverages and the advertising which it does, in the manner described in your letter of inquiry, is merely incidental to the furtherance of its business. Likewise, the taxicab company is engaged in the business of transporting passengers for hire, and the leasing by it of the space on the back of its cabs to the bottling company for the purpose of displaying these advertisements could not be said to cause said company to be "engaged in the business of advertising or bill posting". If that were so, then any person who might lease space to another for the purpose of placing advertising matter thereon would be "engaged in the business of advertising or bill posting". Such, in my opinion, was not within the contemplation of the Legislature when it enacted Schedule 23, supra. Cf. **State v. Levy Loan Co., et al.**, 25 Ala. App. 514, 149 So. 714; and opinions to Hon. G. H. Howard, Probate Judge, Elmore County, Wetumpka, Alabama, under date of February 28, 1939, Quarterly Report of Attorney General, Vol. XIV, page 157, and under date of November 25, 1940, not yet published. A copy of this latter opinion is herewith enclosed for your information.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 9, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Statutes — Constitutionality —

Act. No. 561, H. 608, approved September 22, 1939 (General Acts, 1939, page 883) prohibiting the entry into the State of any motor vehicle carrying over twenty gallons of gasoline, etc., until the State excise tax has been paid on such gasoline, is an unreasonable burden upon interstate commerce, and therefore invalid in such respect.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of November 27, 1940, is as follows:

"Re: Act No. 561 of the Legislature of Alabama, approved September 22, 1939 (General Acts of Alabama, Regular and Special Session of 1939, pp. 883-884)

"Your opinion is requested upon the following questions relating to the above mentioned act, namely:

"1. Is said act constitutional or valid?

"2. Is said act constitutional or valid as the enforcement thereof affects interstate commerce?

"3. Is said act constitutional or valid in respect to its provision delegating power to the Commissioner of Revenue to make necessary, reasonable rules and regulations for the enforcement of the provisions of this act?

"4. Whether or not the following quoted provisions of Section 1 of said act are constitutional and valid, namely:

" 'The provisions of this Act shall not apply to motor vehicles coming into Alabama from States where no limit is fixed by law on the quantity of motor fuel a motor vehicle may carry in the fuel tank thereof, to be used exclusively in the operation of such motor vehicles over the highways of Alabama in compliance with the laws of this State.'

"5. Whether or not the penal provisions of Section 2 would be applicable to a violation of the rules or regulations adopted under said act by the Commissioner of Revenue?

"6. Whether or not the provisions of Section 5 of said act relating to the execution of reciprocal agreements are constitutional and valid?

"7. Whether or not the title of said act is sufficient to support the enactment of such provisions contained in Section 5 of said act?

"8. Whether or not the provisions of said act conflict with Section 45 of the Constitution of Alabama requiring each law to contain 'but one subject to be clearly expressed in the title'; and if you conclude that said act contains more than one subject, which of the provisions, if any, are thus made invalid?

"9. Whether or not the provisions of said act are contrary to the following provisions contained in Section 45 of the Constitution of Alabama, namely: ' . . . no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be reenacted and published at length,' and if so which of the provisions are affected thereby?

"10. In view of the fact that the gasoline tax of the state is levied as an excise tax against distributors, refiners, storers or retail dealers therein, (Schedule 156.1, Article XIII, Chapter 4, General Revenue Act of 1935), whether or not the provisions of the above mentioned act in imposing said excise tax only upon consumers of gasoline transporting the same into the state in such manner in quantities in excess of 20 gallons, are invalid as discriminatory, no similar tax or penal provisions being applicable to consumers operating wholly within the state?

"11. Whether or not said act is unconstitutional or invalid as containing in the title thereof more than one subject, contrary to the provisions of Section 45 of the Constitution of Alabama?"

Act. No. 561, concerning which you inquire, appears to have been modeled upon and is in legal effect identical with Act No. 67 of the General Assembly of Arkansas, approved March 2, 1933, which act was considered by the Supreme Court of the United States in **McCarroll, Commissioner of Revenues of the State of Arkansas, v. Dixie Greyhound Lines, Inc.**, 84 Law. Ed. 441. It was held in the McCarroll case that the statute there considered constituted an unreasonable burden upon interstate commerce, and the Supreme Court of the United States affirmed a decree of the United States Circuit Court of Appeals for the 8th Circuit reversing a decree of the District Court of the United States for the Eastern District of Arkansas denying an injunction against the enforcement of the statute.

In the light of the McCarroll case, I am constrained to advise you that the Supreme Court of the United States has precluded the enforcement of this statute.

In view of the foregoing conclusion that the statute is a direct burden upon interstate commerce, and therefore unenforceable, no occasion arises for answering the other questions propounded in your inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 9, 1940.

Hon. J. F. Craig, Clerk,
Board of Revenue,
Walker County,
Jasper, Alabama.

City Court of Jasper — Walker County, Docket Books —

Board of Revenue of Walker County authorized to buy docket books for City Court of Jasper created by Act. No. 172, H. 633, approved March 29, 1911, Local Acts, 1911, page 176.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of November 27, 1940 follows:

"We have a request from Probate Judge for 1 State Docket for the City Court Judge, this office created 1911 Local acts. We would thank you to advise if we have to purchase dockets for this court which is same as Justice Peace under section 8793-94 1923 Code."

My answer to your inquiry is in the affirmative. Act No. 172, H. 633, approved March 29, 1911, Local Acts, 1911, page 176, creates a court in Precinct 1 of Walker County, Alabama to be known as the City Court of Jasper in lieu of all Justices of the Peace courts and Notaries Public Ex Justices of the Peace Courts in Precinct 1. Your attention is called to Section 9 of said Act which reads as follows:

"9. The county shall furnish all necessary blanks for the use of said court as are now provided by law for Justices of the Peace."

It appears from the clear and unambiguous language of the above quoted section that the county governing body of Walker County shall furnish to the court created by this act all necessary blanks which are required to be furnished to Justices of the Peace Courts.

This office in an opinion to Hon. S. P. Poyner, Judge of Probate, Houston County, Dothan, Alabama, under date of July 12, 1940, appearing on page 53 of Volume XX of the Quarterly Reports of the Attorney General, held that the dockets required to be kept by Justices of the Peace are included within "the necessary blanks * * * that are required to transact the business" in Justices of the Peace Courts, and that the provisions of sections 8793 and 8794 of the Code of Alabama of 1923 (Sections 4728-4729 of the Code of 1907) afford ample authority for the payment of the costs of such dockets from county funds. Cf. Biennial Report, Attorney General, 1928-30, page 148.

In view of Section 9 of the Act here considered, it is my opinion that your county governing body has legal authority to expend county funds for the purchase of dockets to be used in the City Court of Jasper.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 10, 1940.

Hon. W. L. Hobbs,
Clerk and Register,
Circuit Court, Russell County,
Phenix City, Alabama.

1. Clerk of a Circuit Court is entitled to a commission for collecting money on judgment after a period of thirty days has expired since the date of the rendition of the judgment, in an amount equal to one-half the amount which a sheriff receives for collecting money under execution.

2. Such commissions are taxed as costs.

Opinion by the Attorney General.

Dear Sir:

I have your letter of November 28, 1940, in which you request my opinion as follows:

"Please advise the per cent commission to which the Clerk of the Circuit Court is entitled for collecting and paying out money collected for judgment in civil cases, where said judgment is paid to the clerk without execution having been issued, and shall commission be taxed as part of court costs."

Section 7278, Code of Alabama, 1923, deals with the fees and commissions to which clerks of the circuit courts of this state are entitled in civil cases. The pertinent part of that section is as follows:

"Section 7278. Clerks of the circuit courts are entitled to receive the following fees for the following services * * * collecting money on judgments where said judgment has not been paid within thirty days after its rendition, one-half of the per cent allowed sheriffs for the same services for collecting money on executions."

It is my opinion that a clerk of a circuit court is not entitled to any fees for collecting money on judgment where such collection is made within thirty days after the rendition of the judgment.

In those cases where such payment is made after the expiration of thirty days from the date of the rendition of the judgment, it is my opinion that a clerk of a circuit court is entitled to one-half the per cent allowed sheriffs for collecting money on executions, which sum is provided for in Section 7287 of the Code of Alabama, 1923. The pertinent part of said Section 7287 is as follows:

"7278. Sheriffs are entitled to receive the following fees for the following services * * * collecting money under executions: for the first $200, five percent; for collecting all sums over $200 up to and including $500, four per cent; and for collecting all sums in excess of $500, three per cent; but no commission shall be collected on costs."

In answer to that part of your request therein you ask whether or not the commission to which a clerk is entitled is to be taxed as part of the court costs, it is my opinion that such commission should be taxed as a part of the costs of the case. I refer you to the case of **Sloss-Sheffield Steel & Iron Co. v. Brooks,** 96 So. 81. The opinion of the Supreme Court in that case does not directly pass on the question as to whether or not such commissions should be taxed as court costs, but in considering the constitutionality of the act creating such commissions, the Court considers such commissions to be costs.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 10, 1940.

Hon. Chas. E. McCall,
State Treasurer,
Capitol.

States — State Treasurer and Employees of State Treasurer's Office —

Entitled to reimbursement for all travel expense necessarily incurred in the discharge of the duties of said office.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion under date of December 2, 1940, is as follows:

"Please refer to Section 3 of an Act of the Legislature approved September 15th, 1939 and found in General Acts of Alabama, Regular Ses-

sion and Special Session, 1939 at pp. 603-606 and particularly on pp. 605-606, the same being an Act further prescribing the powers, etc. of the Office of the State Treasurer.

"Advise me whether or not the Treasurer may incur per diem travel expense in excess of $3.00 where the same may be demed necessary in the discharge of the duties of his office either by himself or other employees of said office."

In my opinion, your inquiry should be answered in the affirmative, that is, you, as State Treasurer, and the employees of the State Treasurer's office, are entitled to reimbursement for all travel expense necessarily incurred in the discharge of the duties of said office, and you are not limited in the amount which you may be reimbursed for such expenses so incurred to $3.00 per day by the provisions of the so-called McGowin Act of 1933.

The McGowin Act, which is Act No. 87, H. 6, approved March 23, 1933, (General Acts, 1933, page 81) provides:

"Section 1. The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense for transportation shall be $3.00 per diem."

This act controls the expense allowances of persons traveling in the service of the State or any of its agencies or institutions unless there are later acts relating to certain State offices, departments, agencies and institutions which effect a repeal of same in so far as those certain offices, departments, agencies or institutions are concerned.

Section 3 of Act No. 450, H. 550, approved September 15, 1939 (General Acts, 1939, page 603), which is an act to further prescribe the powers, functions and duties of the office of the State Treasurer, etc., provides as follows:

"Section 3. The Treasurer shall have authority to incur such travel expense as may be deemed necessary in the discharge of the duties of his office, either by himself or other employees of his office, reimbursement therefor to be made from the State Treasury, on accounts duly presented and approved by the Governor."

It can be readily seen that Act No. 87, supra, is in conflict with Section 3 of Act No. 450, supra, and it necessarily follows, therefore, that Section 3 of Act No. 450, supra, being the last expression of the legislative will on this subject, controls, and the provisions of Act No. 87, supra, are repealed in so far as they affect the State Treasurer and the employees of the State Treasurer's office. Consequently, the State Treasurer and the employees of his office are entitled to reimbursement for all travel expenses necessarily incurred in the discharge of the duties of said office, in accordance with the provisions of Section 3 of Act No. 450, supra.

This holding is in accordance with a number of prior opinions of this office. See opinions to Hon. H. W. Nixon, State Toxicologist, Auburn, Alabama, under date of January 16, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 50; to Hon. D. Trotter Jones, Chairman, Alabama Boxing and Wrestling Commission, Montgomery, Alabama, under date of December 7, 1939, Quarterly Report of Attorney General, Vol. XVII, page 367; to Hon. Asa Rountree, Jr., State Director of Airfield Development, Aviation Commission, Montgomery, Alabama, under date of November 22, 1939, Quarterly Report Vol. XVII, page 292, and the several opinions cited therein.

Your attention is called, however, to the fact that pursuant to the provisions of Section 820 of the Code of Alabama, 1923, all claims for traveling expenses payable out of the State Treasury, incurred by one traveling in the service of the State or any of its offices, departments, institutions or agencies must be itemized, verified by affidavit, with vouchers therefor attached, before the Comptroller can lawfully issue a warrant in payment of the same. See opinion to Hon. B. P. Singleton, State Comptroller, Capitol, under date of April 22, 1939, Quarterly Report of Attorney General, Vol. XV, page 53.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 11, 1940.

Hon. D. M. Weakley, Superintendent,
Alabama Boys Industrial School,
Birmingham, Alabama.

Alabama Boys' Industrial School—Lease-Sale Contract—Incurring Debt Payable beyond current year—

1. Alabama Boys' Industrial School not authorized to lease land useful for its operation beyond the term of one year, where installments of rent therefor are payable more than one year after date of lease. Constitution, 1901, Sec. 213 as amended, Art. XXIII.

2. Alabama Boys' Industrial School authorized to lease land for a period of five years, with option to purchase, provided lease contract contains proviso that lease may be terminated at end of any fiscal year.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of November 8, 1940, in which you request my opinion as follows:

"The Board of Directors of the Alabama Boys Industrial School wish to acquire a piece of real estate adjoining the School.

"We wish to know if we have the authority to lease this property for a period of five years, interest at 5% annually, with the option to purchase it at any time within the five year period.

"The money which we intend to use for the purchase of this property was not appropriated by the Legislature, but is derived from a private source.

"The enclosed letter from Hon. Peyton D. Bibb will give you a better understanding of this transacation."

The letter above referred to reads as follows:

"October 15, 1940

"Colonel D. M. Weakley,

Alabama Boys' Industrial School,

Birmingham, Alabama.

"Dear Colonel Weakley:

"Confirming our conversation concerning your desire to purchase approximately four acres of land adjoining the school property from Mr. Warrick, it is my understanding that the purchase price is to be $7,000.00. It is also my understanding that you do not now have available the sum of $7,000.00 with which to make this purchase. Mr. Warrick is willing to accept 10% down payment and the balance within five years at 5% interest.

"While the law gives the Alabama Boys' Industrial School the right to acquire real estate, by purchase or condemnation, I do not believe that the law authorizes the Board to purchase property on mortgage. Certainly the Board does not appear to have the authority to incur a binding interest-bearing mortgage indebtedness on behalf of the State.

"If the Board finds the use of this property to be necessary or advantageous in the operation of the school, then I think it has the power and authority to lease the property. It is my understanding that Mr. Warrick is willing to lease this property to the school for a term of five years upon your paying $700.00 plus an annual payment of $315.00 per year, or the equivalent of 5% interest annually on $6300.00. As a part of the lease, he is willing to give the school an option to purchase the property at any time within the five years upon payment of the $6300.00, the annual payment of $315.00 to be prorated to the date of any such purchase.

"Taken as a lease, aside from the option to purchase, this would amount to a five-year lease of the fourteen acres at a total rent of

$2275.00. If the Board finds this to be a reasonable rental for the property for a term of five years, then it is my opinion that the Board would have the authority to execute the lease and would also have the right to reserve to itself therein an option to purchase the property at $6300.00.

"If the Board wishes to lease the property with the option to purchase, it should not be done except with full approval of the Governor. If he approves the proposed transaction in principle, then it would also be advisable to obtain the approval of the Attorney General to the end that there might not thereafter be a question of the propriety of the expenditures made should you find it impossible to exercise the option to purchase.

"Please let me know your further wishes in the matter.

Very truly yours,

B:f (Signed) Peyton D. Bibb."

Amended Section 213 of the Constitution of 1901, known as Article XXIII and ratified August 2, 1933 (Alabama Constitution Annotated, Skinner, page 987) except for certain purposes therein enumerated and not pertinent to this discussion, provides that "no new debt shall be created against, or incurred by the State, or its authority." And, further to emphasize the prohibition, said amendment reads in part : "Any person violating any of the provisions of this amendment shall, on conviction, be punished by a fine of not exceeding Five Thousand Dollars or by imprisonment in the penitentiary * * * and the violation of any of the provisions of this amendment shall also be ground for impeachment."

Commenting thereon, the Supreme Court in **Abramson et al. v. Hard, Comptroller, et al.,** 229 Ala. 2, 155 So. 590, observed on page 13, that its purpose "was to prevent another deficit in the State Treasury;" and in **Hall v. Blan, State Treasurer,** 227 Ala. 64, 148 So. 601, it was observed on page 72, with reference to the original Section 213:

"This section is so clear and explicit that its import cannot well be questioned. It demands that the State of Alabama shall be run on a pay as you go basis; in modern terminology, 'on a balanced budget.' It withdraws from every department of the State government any power to run the State into debt. The State, and every official thereof, is put under absolute disability to incur debt, except as therein specified. The legislature can not create debt by appropriation in excess of revenues, by the creation of new offices, by expanding the functions of government, nor by enlarging the activities of its departments, however important, or however insistent the public demand. Nor can executive officers create debt by issuance of warrants pursuant to appropriations, notwithstanding the holder has rendered a public service, advanced money, or materials for governmental uses on the faith that the State, through its constituted authorities, would provide the means of payment."

Alabama Boys' Industrial School, a body corporate, was created by an Act of the Legislature of Alabama, No. 442, S. 470, approved September 26, 1919, (Gen. Acts, 1919, pages 567, 666, carried into the Code of 1923 as Sections 55 to 73 inclusive), as a part of the educational system of the State and in the interest of unfortunate boys. **Alabama School Code 1927,** SS. 689-708.

The School may be termed a State educational and welfare institution, and is clearly an agency of the State in the same sense that its university, insane hospital, normal schools and numerous other State institutions are agencies existing for the purpose of better government and for the general welfare of the State.

Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114;

Alabama Industrial School v. Addler, 144 Ala. 555, 42 So. 116;

Cox v. University of Alabama, 161 Ala. 639, 49 So. 814;

White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454.

It goes without saying that it is beyond the power of the legislature to authorize its creature or agent to exercise any powers or do any acts in conflict with the Constitution, and more especially in conflict with amended section 213 thereof, in the matter of debt. Whatever debt the school may create or undertake to create must be paid out of the State Treasury by virtue of legislative appropriations, on which the school is dependent for its existence and operation (Code, 1923, Sec. 73).

I am of opinion therefore that Alabama Boys' Industrial School is without power to bind itself for the payment of money beyond the current year of operations each year, or in other words to incur debt in any one year whether for capital expenditures or operating expense, such as purchase or lease of additional land, payment to be made beyond the expiration of the current fiscal year, wherein the obligation was incurred.

Harman v. Alabama College, 235 Ala. 148, 150, 177 So. 747.

Likewise, in my opinion, any agreement whereby it undertook to lease such lands, however useful or desirable, for a term of more than one year, and to bind itself for the payment of rent under such lease for a longer term than one year, would be illegal and in conflict with Section 213 of the Constitution, supra. Such an agreement would create a debt necessarily, and would therefore be unauthorized and unenforceable.

It is competent, however, under the former opinions of this office, for the school to lease such land for a term of five years, with the option to purchase the same during that term, or upon expiration of the term; provided there is incorporated in the lease-option-sale agreement a proviso authorizing the lessee to terminate the lease upon appropriate notice at any time during the term. Such a stipulation is considered as removing the

agreement from the ban of Section 213 of the Constitution, inasmuch as in that case there is no binding obligation on the State or its agency to continue to pay rent beyond the expiration of its fiscal operating year.

See opinion of this office dated Jan. 11, 1940 to Hon. William E. Persons, Director, Department of Corrections and Institutions, in Volume XVIII of Quarterly Reports, Attorney General, page 37.

In that opinion this office ruled that said Department might, without violence to Section 213 aforesaid, execute a "lease-sale contract" (with option to purchase included), with reference to certain lands for a term of years, upon the following condition:

> "If the so-called 'lease sale contract' * * * contains a proviso that it may be terminated at the end of any year without further liability on the part of the State and does not bind the State to the payment of the annual rental except for the years the State elects to use the land, and does not bind the State to purchase the land but merely gives the State an option to purchase at any time during the life of the contract for an agreed price * * * the contract would not amount to the creation of a debt prohibited by Section 213," etc.

I do not understand the purport of the statement in the third paragraph of your request that "the money which we intend to use for the purchase of this property was not appropriated by the Legislature, but is derived from a private source."

If the purchase money is already in hand then, of course, there is nothing to prevent its use for the purchase, and there is no occasion to execute a contract for its purchase or to incur obligations for future payment of rent.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 11, 1940.

Hon. Hugh D. Merrill, Speaker,
House of Representatives,
Anniston, Alabama.

Taxation—Housing Authorities—

Bonds of the Anniston Housing Authority are exempt from ad valorem taxation in Alabama under Section 2 of Act No. 194, H. 324, approved July 10, 1935, Gen. Acts, 1935, page 256.

Interest from said bonds is exempt from Alabama income tax under Section 345.10 of Act No. 194, supra.

Opinion by Assistant Attorney General Kohn.

Dear Judge Merrill:

I have your letter of November 15, 1940 in which you request my opinion as follows:

"I should like to have your opinion on the following:

"1. In view of the advisory opinion of the Supreme Court of Alabama in 1938 (235 Ala. 485, 179 Sou. 535), are the bonds of a local housing authority organized under the Housing Authorities Law of the State of Alabama exempt from ad valorem taxation as being the bonds of an administrative agency of a municipality and, therefore, within the exemption provided in Section 2 of Act No. 194 of the General Laws of Alabama, 1935 to bonds issued by municipalities?

"2. Is the interest on such bonds as described above exempt from the state income tax as being bonds of an administrative agency of a municipality and, therefore, within the exemption provided in Section 345.10 of Act No. 194 of the General Laws of Alabama, 1935 to obligations of a municipality?"

In my opinion, your questions should be answered in the affirmative.

Sections 2, 345.1, 345.8 and 345.10 of Act No. 194, H. 324, approved July 10, 1935, Gen. Acts, 1935, page 256, provide in part as follows:

"Sec. 2. **Persons and Property.** The following property and persons shall be exempt from ad valorem taxation and none other: (a) All bonds of the United States and this State, and all county and municipal bonds issued by counties and municipalities in this State, . . ."

"Sec. 345.1. **Income Tax.** In addition to all other taxes now imposed by law there is hereby levied and imposed a tax on the entire net income as defined in this Article, . . . "

"Sec. 345.8. **Net Income Defined.** (Individual) In the case of an individual, the term 'net income' means the gross income as defined by Section 345.10 of the Article, less the deductions allowed by Section 345.11 of this Article."

"Sec. 345.10. **Gross Income Defined.** (Individual) The term 'gross income' as used herein does not include the following items which shall be exempt from income tax under this Article . . . (g) Interest on obligations of the State of Alabama and any county, municipality, or other political subdivision thereof; . . ."

Section 1 of Act No. 148, S. 76, approved March 17, 1939, Gen. Acts, 1939, p. 219, provides in part as follows:

" * * * NOTICE, HEARING AND CREATION OF AUTHORITY. When the application has been made, filed and recorded, as herein provided, the Authority **shall constitute a public body and a body corporate and politic under the name proposed in the application;** the Secretary of State shall make and issue to the said commissioners, a certificate of incorporation pursuant to this Act, under the seal of the State, and shall record the same with the application." (Emphasis supplied.)

In **New York City Housing Authority v. Muller,** 270 N. Y. 333, 1. N.E.(2) 153, the New York Court of Appeals, in referring to the New York City Housing Authority, said:

"The fundamental purpose of government is to protect the health, safety, and general welfare of the public. All its complicated activities have that simple end in view. Its power plant for the purpose consists of the power of taxation, the police power, and the power of eminent domain. Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it. There are differences in the nature and characteristics of the powers, though distinction between them is often fine. * * * But if the menace is serious enough to the public to warrant public action and the power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers is employed."

In **In re Opinion of the Justices,** 235 Ala. 485, 179 So. 535, our Supreme Court, in holding that the real and personal property of Alabama housing authorities was exempt from ad valorem taxes, said:

"If the property referred to is to be owned by a municipal corporation, since it is not to be that of the state or a county, it will be exempt from the ordinary ad valorem taxes imposed by any authority under this state. This does not mean that it shall be exempt from improvement assessments.

* * *

"The purpose to impose such tax is not to be implied, but clearly expressed, otherwise it will be presumed not to be intended.

* * *

"The Housing Authority is to be a corporation brought into existence upon the order of a city government, public in nature, and charged with the duty of performing an important element of the police power of the city under whose sanction it shall come into existence.

* * *

"It is clear that if the power conferred by the act in question were conferred on the city proper, the property made subject to its terms

would be exempt under Section 91, Constitution. When the city is performing a governmental function, it is none the less so because it is done by the instrumentality of some administrative agency, such as a board, commission, or even a corporation set up for that purpose, created by or for the city's use in that connection.

"The mere fact that it is a corporation does not deprive it of the qualities of a governmental agency, nor of the immunities of the government for which it operates.

* * *

"The Housing Authority is an administrative agency of a city, and its property is therefore for certain purposes that of a municipal corporation and is entitled to the tax exemption of section 91, Constitution." (Emphasis supplied.)

See also **Branner et al v. Housing Authority of Birmingham District,** (Ala.), 195 So. 256.

In **Higbee v. Housing Authority of Jacksonville,** 197 So. 479, the Supreme Court of Florida quotes with approval from the case of **Allydonn Realty Corp. v. Holyoke Housing Authority,** 23 N. E. 2d 665, in which the Supreme Judicial Court of Massachusetts said:

"'As soon as it is established that the primary purpose of the statute is a public purpose, the various provisions for the creation of housing authorities, selection of the site, co-operation by municipalities, exercise of the right of eminent domain, and exemption from taxation take their appropriate places as legitimate parts of the entire plan. * * *"

In my opinion, the bonds of the Anniston Local Housing Authority are bonds of a public administrative agency of the City of Anniston and as such come within the exemption, "bonds of municipalities" as enumerated in Section 2 of Act No. 194, supra, and are exempt from ad valorem taxation.

It therefore follows that the interest from said bonds is exempt from the Alabama Income Tax and should not be figured in the gross income as provided in Section 345.10 of Act No. 194, supra, as said interest comes within the exemption of "interest on obligations of any municipality."

In **Laret Inv. Co. v. Dickmann,** 134 S. W. 65, the Supreme Court of Missouri, in Banc, said:

"The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed for the performance of an essential public service.

* * *

"The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function."

In **Wells v. Housing Authority of City of Wilmington**, 197 S. E. 693, the Supreme Court of North Carolina said:

"The word 'municipal', as originally used in its strictness, applied to cities only, but the word now has a much more extended meaning, and when applied to corporations the words 'political,' 'municipal,' and 'public' are used interchangeably."

* * *

"Applying again the principle that courts may not declare an act of the Legislature unconstitutional in a case of doubt, we find that the Housing Authorities Act under consideration is a constitutional exercise of a legislative power and that the agency therein set up is a municipal corporation within the meaning of the provisions of the Constitution which we have discussed."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 12, 1940.

Mrs. Marie B. Owen, Director,
Department of Archives and History,
Capitol.

Public Library Service Division authorized to use funds allocated to it by Act No. 567, H. 954, approved September 19, 1939 (General Acts, 1939, page 899) to pay for work of assisting in translating French and Spanish documents pertaining to the history of the Colonial Period of Alabama.

Opinion by Assistant Attorney General Russell.

Dear Mrs. Owen:

Your request for official opinion, under date of December 5, 1940, is as follows:

"The Library of Congress has loaned to the Alabama State Department of Archives and History certain French and Spanish documents pertaining to the French and Spanish history of Alabama, which must be translated into English before becoming available to students of Alabama history.

"The Alabama State Department of Archives and History has had a grant made to it by the United States Works Projects Administration of $14,312 to pay for the work of copying and comparing these translations,

but this project cannot begin to operate until a sufficient amount of translations is made to justify the setting up of the typing and comparing project.

"In order to hurry the work it will be necessary for the Department of Archives and History to employ an assistant to aid the Jesuit Priests of Spring Hill College who are making these translations as a contribution to the work by Spring Hill College for the State. I might add at this point that the Library of Congress is insisting that this work be completed as soon as possible due to the fact that the documents which they have loaned us are of rare value, no other copies being in America, and they do not want the same out of their hands for any great length of time.

"When the documents have been translated into English they will be printed by the State of Alabama in the 'Alabama Historical Quarterly' which is published by the Department of Archives and History. This magazine is published every three months and 1,000 copies are distributed gratuitously to public officials and libraries in the State of Alabama. The translation of these historical documents will be given to the readers of this magazine in installments. However, the State printer will run off at least 1,000 extra copies of that section of the magazine so that when a volume is completed it will be bound into complete volumes containing nothing else. It can, therefore, be seen that when the full story of the Colonial history of Alabama has been published during this period of time the Department of Archives and History will have at its disposal for readers of Alabama history many copies of the 'Alabama Historical Quarterly' and also the complete volumes for free distribution.

"This work is very important, and I believe legitimately falls within the scope and purpose of the Act creating the Public Library Service Division in the State Department of Archives and History, as its whole purpose is to disseminate knowledge about the State's history from its earliest period to the present for libraries as well as to the general public.

"It will take $1200 to employ an assistant to aid the Jesuit Priests in this translation for a period of six months, and I would like to know whether or not this amount can be taken from the funds which are allocated to the Public Library Service Division under the provisions of Act No. 567, H. 954, approved September 19, 1939 (General Acts, 1939, page 899), and used for this work."

In answer to your inquiry, attention is first called to Section 3 of Act No. 171, H. 327, approved March 17, 1939 (General Acts, 1939, page 297), which is as follows:

"Section 3. DUTIES AND POWERS. The Public Library Service Division shall give advice to all free public, regional, city and county libraries and to all communities in the State which may propose to establish public libraries, in the manner hereinafter provided, as to the best means of establishing and administering such Public Library service; selecting and cataloging books and other details of library management;

and may send any of its staff to aid in organizing such libraries, or to assist in the improvement of those already established; may advise as to the proper qualifications of librarians of free public, regional, city and county libraries, and shall perform such other services consistent with and in furtherance of the purpose of this Act as shall from time to time appear feasible. Moreover, the Division shall advise as to arrangements as provided in Section 1548 of the Code of Alabama 1923, by which local governmental agencies may combine in the establishment of joint units of library service. The Division may receive and shall administer all funds, books or other property, from whatever source, under such conditions as may be deemed necessary in order to carry out the purpose of the Act; and by the use of such means and methods as circumstances warrant the Division may acquire and operate traveling libraries and circulate or loan such books and libraries among communities, libraries, library associations, social and civic clubs and organiaztions and other public agencies and institutions under such conditions and rules as the Division deems necessary in order to protect the interests of the State and to increase the efficiency and promote the extension of Public Library service throughout the State."

It will be noted that Section 3, supra, in defining the duties and powers of the Public Library Service Division of the Alabama Department of Archives and History provides among other things that it "shall perform such other services consistent with and in furtherance of this act as shall from time to time appear feasible," and also that "the Division may receive and shall administer all funds, books or other property, from whatever source, under such conditions as may be deemed necessary in order to carry out the purposes of the Act."

Attention is next called to Section 1 of Act No. 171, supra, which provides as follows:

"Section 1. That in order to aid in the development of higher ideals of citizenship and the enlargement of opportunity for culture and recreation, and in order to afford an additional means for the further upbuilding of the educational facilities of the State, there is hereby created a Public Library Service Division in the State Department of Archives and History, which shall have as its chief objective the development of a cooperative system of providing books and library service for the various cities and counties of the State."

It will be noted that the above quoted section provides that the chief objective in creating the Public Library Service Division in the State Department of Archives and History was for "the development of a cooperative system of providing books and library service for the various cities and counties of the State."

In my judgment, the work of assisting in translating the French and Spanish documents referred to in your letter for the purpose of providing, for free distribution, history books pertaining to this particular Colonial Period of Alabama to the various libraries of the State falls within the scope and purpose of the Public Library Service Act and therefore, in view of the

powers granted the said Division in Section 3 of said Act, supra, the funds allocated to the said Division by Act No. 567, H. 954, approved September 19, 1939 (General Acts, 1939, page 899) may be used to pay for said work.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 12, 1940.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools—Teachers—Military Leave—

Right of military leaves of absence for employees of county and city boards of education, under the general law, discussed.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion under date of November 25, 1940, is as follows:

"Your opinion is requested on the following questions:

"Question No. 1. Can a county board of education or a city board of education pay a teacher or a principal or any other person employed by such board for a leave of absence of twenty-one days granted by such board for any service specified in Section 12 of the Alabama Military Code, in accordance with Section 12 of the Alabama Military Code, and in accordance with Act No. 85 of the Alabama School Code, approved March 4, 1931, where such person is inducted into Federal service for intensive training for a period of one year or more?

"Question No. 2. In accordance with Section 319 of the 1927 School Code of Alabama, regular employees of county and city boards of education are paid in accordance with one or two pay plans, i.e., on a calendar monthly basis for a given number of months per year, or on a scholastic monthly basis for a given number of months per year. If the answer to Question 1 is in the affirmative, does the twenty-one working days specified in Section 12 of the Military Code of the State of Alabama refer to twenty-one days according to the pay plan of the employing board for the person securing the leave of absence?"

In answering your first inquiry, it will be assumed that the persons concorned are active members of the Alabama National Guard or Naval Militia

or of the Officer's Reserve Corps of the United States Army or of the United States Naval Reserve, for this office has heretofore held that Section 12 of Act No. 143, H. 63, approved April 22, 1936 (General Acts, 1936, page 105), known as the Military Code of Alabama, as amended by Section 5 of Act No. 509, H. 773, approved September 22, 1939 (General Acts, 1939, page 774), is confined, as a matter of right, to the members of these branches of the service. See opinion to Hon. W. C. Harrison, Associate Member, Alabama Public Service Commission, rendered under date of October 15, 1940, copy of which is herewith enclosed for your convenience.

Section 12 of the Military Code of Alabama, as amended, is as follows:

"Section 12. MILITARY LEAVE FOR GOVERNMENT EMPLOYEES: All officers and employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who shall be active members of the Alabama National Guard or Naval Militia, or of the Officer's Reserve Corps of the United States Army, or of the United States Naval Reserves, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other service ordered under the provisions of this Act, or of the National Defense Act, or of the Federal laws governing the United States Naval Reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid for more than twenty-one working days at any one time."

It is my opinion that unquestionably employees of county boards of education and city boards of education are "employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof." This being true, the county board of education and the city board of education may grant leaves of absence to their employees who are in the branches of the services above noted, under the provisions of Section 12, supra.

With respect to leaves of absence for those employees who are not members of the branches of the service hereinabove noted, your attention is called to Section 176 of the School Code of 1927, as amended by Act No. 85, H. 110, approved March 4, 1931, General Acts, 1931, page 164, and to Section 240 of the School Code of 1927, authorizing the county board of education and the city board of education, respectively, to provide for the payment from public funds of teachers or other employees during the vacations therein specified.

It is my opinion that the right given in these sections, i. e., Section 176, as amended, and Section 240, supra, to provide payment for teachers absent for "some other unavoidable cause which prevents such teacher from discharging his duties", is ample legal basis for the school authorities to provide for leaves of absences with pay not to exceed one week during any year for the employees who will be inducted into the Federal service under the so-called "Selective Service Act" of the Congress of the United States.

Answering your second inquiry, it is my opinion that the twenty-one days leave with pay provided in Section 12, supra, should be calculated according to the pay plan of the employing board for the person securing the leave

of absence. I can conceive of no more reasonable basis for calculating the pay to which such employees would be entitled than that upon which the daily compensation of the employees concerned is figured.

This opinion is confined to an interpretation of the general law and does not take into consideration any special or local acts.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 13, 1940.

Hon. Thomas A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Veterans—Uniform Guardianship Act—General Acts, 1931, p. 280, Sections 4572-4580, Code of Alabama, 1923—

Appointment of guardian under the provisions of General Acts, 1931, p. 280, providing for appointment of guardian for incompetent veteran whom the Veterans' Bureau deems incompetent and for whom the Bureau requires a guardian, is not such an adjudication of insanity as to prevent the trial of a veteran charged with an offense, nor would the fact that the veteran had been admitted to a Government hospital, and while there been rated as a non compos mentis, prevent the trial of the veteran, after leaving the hospital, for the commission of an offense. The defendant in any criminal case may plead insanity as a defense by complying with Section 4573 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of December 4, 1940, in which you request my official opinion as follows:

"Will you please give me a ruling on the following. We have a man here that is an ex-service man, having served during the World War.

"Later he was sent to the Government Hospital, and while there the doctors rated him a non-compos-mentis. (Totally disabled) and placed his affairs in the hands of a guardian.

"He has been arrested and placed in jail for Assault and Battery and is awaiting trial.

"Please advise me if he can be tried or not."

It is my opinion that such a person may be brought to trial. I call your attention to Sections 6 and 15 of Act No. 240, S. 104, approved June 6, 1931, (General Acts, 1931, p. 280) known as the "Uniform Guardianship Act for Incompetent Veterans". Said sections provide:

"Section 6. Where a petition is filed for the appointment of a guardian of a mentally incompetent ward a certificate of the Director, or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such persons by the Bureau, shall be prima facie evidence of the necessity for such appointment."

"Section 15. Whenever it appears that an incompetent veteran of any war, military occupation or expedition, is eligible for treatment in a United States Veterans' Hospital and commitment to such hospital is necessary for the proper care and treatment of such veteran, the courts of this state are hereby authorized to communicate with the Bureau with reference to available facilities and eligibility and upon receipt of a certificate from the Bureau stating that there are facilities available in a United States Veterans' Hospital and that the veteran is entitled to hospitalization therein, the court may then direct such veteran's commitment to such United States Veterans' Hospital. Thereafter such veteran upon admission shall be subject to the rules and regulations of such hospital and the officials of such hospital shall be vested with the same powers now exercised by superintendents of state hospitals for mental diseases within this state with reference to the retention of custody of the veteran so committed. Notice of such pending proceedings shall be furnished the person so committed and his right to appear and defend shall not be denied."

The fact that one has had a guardian appointed for him or has been adjudged insane does not ipso facto excuse him for his criminal acts. Such a person may be brought to trial and the question determined as to his mental status at the time of the commission of the act for which he is tried.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 13, 1940.

Mrs. F. C. Turner,
Judge of Probate,
Washington County,
Chatom, Alabama.

Licenses—Hunting—Residence—

1. A county hunting license may be issued only in the county in which the person to whom the same is issued permanently resides.

2. A state hunting license may be issued in any county in the State.

Opinion by Assistant Attorney General Garrett.

Dear Mrs. Turner:

Your request for an official opinion under date of December 6, 1940, is as follows:

"Will you please refer to 1935 Acts at page 638 and give me your official opinion as to whom to issue County hunting license, and what the county hunting license covers etc.

"My interpretation of this law is this: A county hunting license can only be issued to permanent residents of a county, and gives them the right to hunt in the county of his residence only, and a State hunting license can be issued to any one who resides in the State of Alabama, and can be issued by any Probate Judge in the State, regardless of the applicant's county residence.

"There has been some little misunderstanding of the law in this County, an Agent authorized to issue hunting license in Clarke County has misinterpreted the law, and has issued county hunting license to my people over here in Washington County and has led them to believe that a County hunting license issued in Clarke County entitles them to hunt in Washington County as well as in Clarke County."

The provisions of the statutory law of this state pertinent to your inquiry are contained in Sections 28, 29, 30 and 34 of Act No. 240, S. 226, approved August 12, 1935, General Acts, 1935, page 632, which read respectively as follows:

"Section 28. All hunting and fishing licenses, both resident and non-resident, shall be numbered consecutively at the time they are printed. Blank licenses shall be furnished by the Commissioner to the Judges of Probate of the several counties of the State, or the License Commissioner, and to such other person or persons not residing at the county seat as may be designated by the Commissioner, to issue hunting and fishing

licenses, and the Commissioner shall deliver, not less than fifteen days before the first day of October of each year, to the Judges of Probate of this State and to such other person or persons so designated, as many such licenses as may be required, and shall charge with same all those to whom licenses have been so issued. On the first day of October in each year, or within ten days therefrom, each officer or person to whom licenses have been so issued shall return to the Commissioner all unused licenses and all stubs of licenses issued during the preceding fiscal year."

"Section 29. Any person who has been a bona fide resident of this State for six months next preceding may procure a county hunting license for himself or herself by filing his or her application with the person in the county in which he or she permanently resides, duly authorized to issue said license, stating his or her age, color, place of residence, post office address, and after paying to the person issuing same a license fee of one ($1.00) dollar."

"Section 30. Any person who has been a bona fide resident of the State for six months next preceding may procure a State hunting license for himself or herself, by filing with any duly authorized person in any county of the State to whom he or she applies for license, the application provided in the preceding section, and after paying to the person issuing said license a fee of three ($3.00) dollars."

"Section 34. Any person who hunts on lands other than he owns and permanently resides thereon, or rents or leases strictly for growing agricultural crops as a means of livelihood and resides on such lands, without first obtaining a county hunting license, permitting him or her to do so, or who hunts outside of the county in which he actually resides without first obtaining a State hunting license, permitting him or her to do so; or any non-resident of the State who hunts in this State, without first obtaining a non-resident hunting license, permitting him or her to do so; or who lends or transfers his or her hunting license to another, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than ten ($10.00) dollars nor more than twenty-five ($25.00) dollars for each offense; provided that all land owners and landlords and members of their immediate families residing and having their permanent residence with them may hunt upon their own land on which they reside and have their permanent residence without a license; and tenants and members of their immediate families living and having their permanent residence with them may hunt upon the lands which they rent strictly for agricultural purposes as a means of livelihood and on which they permanently reside without a license."

By Section 28, supra, hunting licenses may be issued by the Judges of Probate of the several counties of the state, or the License Commissioner, or by such other person or persons not residing at the county seat as may be designated by the Commissioner (the Director of Conservation. See Section 6 of Act No. 162, H. 52, approved March 14, 1939, General Acts, 1939, page 255).

Section 29, supra, provides that any person who has been a bona fide resident of the state for six months next preceding may secure a **county** hunting license by filing his application **with the person in the county in which he or she permanently resides, duly authorized to issue said license.**

Section 30 provides that such a person may procure a **state** hunting license by filing his application **with any duly authorized person in any county of the state.**

Section 34, supra, makes it a misdemeanor for a person to hunt on lands which he owns and on which he permanent resides, or rents or leases strictly for growing agricultural crops as a means of livelihood and on which he resides, without first obtaining **a county hunting license, permitting him** to do so, and also makes it a misdemeanor for a person to hunt **outside of the county in which he actually resides without first obtaining a state hunting license, permitting him to do so.**

Construing all of said sections together, it is very clear:

1. A person desiring to secure a **county** hunting license must make application for the same to a person in the county in which he permanently resides, duly authorized to issue the same, and said license only authorizes him to hunt in the county in which he actually resides.

2. A person desiring to secure a **state** hunting license may make application therefor to any duly authorized person in any county of the state, and such state hunting license authorizes him to hunt in any county in the state, without procurement of a **county** hunting license.

3. A **county** hunting license may only be issued by a duly authorized person in the county in which the person to whom the license is issued resides.

For your further information, you are advised that this office recently ruled that the words "permanently resides" used in Section 29, Supra, do not mean legal residence or the equivalent of domicile, but simply indicate a person's place or abode. This was the holding of an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of October 23, 1940, a copy of which is herewith enclosed for your convenience.

The premises considered, a person whose place of abode is in Washington County should secure a **county** hunting license from you, or some other person duly authorized to issue the same in Washington County, which license only authorizes him to hunt in Washington County; and a person whose place of abode is in Clarke County should secure his **county** license from the Judge of Probate of Clarke County or some other person duly authorized to issue the same in Clarke County, which license only authorizes him to hunt in Clarke County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 14, 1940.

Miss Addie Lee Farish,
Superintendent of Banks,
State Department of Commerce,
Montgomery, Alabama.

Banks and Banking—Rules and Regulations—Superintendent of Banks—Form of bonds of bank officers and employees—

The Superintendent of Banks, with the concurrence of two members of the Banking Board, is authorized to prescribe the form of bond required to he furnished by every officer and employee of a State bank under Section 6401 of the Code of Alabama, 1923, as amended, (Acts 1931, page 256) and to prescribe such form by a rule or regulation as authorized by Act No. 44, S. 158, approved March 8, 1933 (Gen. Acts, 1933, Extra Session, page 20).

Opinion by Assistant Attorney General Matthews.

Dear Miss Farish:

I have your letter of December 12, 1940, in which you request my opinion as follows:

"Section 6401 of the Code, as amended by House Bill 206, approved May 20, 1931, provides that the amount of bonds covering officers and employees of State banks shall be satisfactory to the Superintendent of Banks, and that the bonds must be on such form as may be approved by the Superintendent of Banks. Please advise if, in your opinion, I am authorized under this Section to prescribe the form of bond covering officers and employees in State banks."

Under Section 6401 of the Code of 1923, as amended by Act No. 189, H. 206, approved May 20, 1931 (General Acts, 1931, page 256), every officer and employee of a bank organized under the laws of the State of Alabama is required to furnish a bond, the amount and form of which must be satisfactory to and approved by the Superintendent of Banks.

Act No. 44, S. 158, approved March 8, 1933 (General Acts 1933, Extra Session, page 20), which appears as Section 6276(1) in Michie's Cumulative Supplement to the Alabama Code (1936) reads as follows:

"Section 1. Whenever, in the opinion of the Superintendent of Banks, it shall be deemed desirable in the public interest, the Superintendent of Banks shall be authorized, with the concurrence of not less than two other members of the Banking Board, to promulgate or approve such rules or regulations with respect to banking practices, business and/or transactions within the State or within any community or locality therein, as shall, in his opinion, be deemed necessary; such rules or regulations to continue in force for such period as may be fixed by him in promulgating the same and until modified, suspended or terminated as hereinafter provided.

"Section 2. Any such rule or regulation may be extended, modified, suspended or terminated by the Superintendent of Banks, with like concurrence, or by a majority of the Banking Board by filing their written concurrence to that effect with the Superintendent of Banks, who shall thereupon forthwith give effect to the same."

I am of the opinion, therefore, that under the authority of this statute, it is competent for the Superintendent of Banks by rule or regulation, with the concurrence of two other members of the Banking Board, to prescribe the form of bond required to be given by officers and employees of state banks, under Section 6401 of the Code of Alabama, 1923, as amended, supra.

The question of the power of State boards, bureaus, departments and agencies to make reasonable rules and regulations for the execution and administration of the powers intrusted to them by the Legislature was considered at length in an opinion of this office rendered March 29, 1939, to Dr. Walter B. Jones, Commissioner, Game, Fish and Sea Foods, in Volume XIV, Quarterly Reports of the Attorney General on page 260.

Under the authorities referred to in said opinion, there can be no question as to the power of the State Superintendent of Banks to prescribe the form of bond as aforesaid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 14, 1940.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Judges of Probate—Mobile County—

Public funds deposited to the credit of deceased Probate Judge may be withdrawn by the legally qualified successor appointed by the Governor. (Code of Alabama, Sections 2697(1), 2689, 9571, 9594.)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion under date of December 9, 1940, is as follows:

"I wish to get a ruling from you on several matters that have arisen in connection with the office of the Probate Judge in this County where we all need your opinion for our guidance and protection.

"The late Judge Matt A. Boykin had certain accounts in local banks in which various funds were deposited. My understanding is that these accounts were carried in the name of Matt A. Boykin, Probate Judge, The question now arises is how these funds should be checked out of the banks, because I, as Probate Judge, my Chief Clerk, and the banks wish to be fully protected in any action we take.

"What brought the matter up this morning was a request from Mr. E. A. Zelnicker, License Inspector for this County for a check representing penalties and citation fees due him on automobiles and business-privilege licenses. Of course, the Probate Judge has heretofore made these remittances to Mr. Zelnicker each month, and November is his banner month, and I would like to facilitate Mr. Zelnicker in collecting the fees due him.

"I understand that Mr. B. P. Singleton, Chief Examiner of Accounts, is now conducting a detailed audit of the affairs of the Probate Court, and I am further advised that it will be several months before this audit will be completed. My information is that there is no question about the amount of fees due Mr. Zelnicker, and I would like to assist him in getting these fees at this time if this can be arranged in such a manner as to fully protect me, my Chief Clerk, and the banks.

"Under Section 9594 of the Code certain authority is vested in the Chief Clerk pending a vacancy but it would seem that this authority will only authorize the Chief Clerk to perform such duties as he could perform if there had been no vacancy. Unless the Chief Clerk had the right to disburse such funds when no vacancy existed then it occurs to me that probably the Chief Clerk would not have authority to disburse these funds during such vacancy.

"Then again, I have now qualified as Probate Judge so a vacancy no longer exists, and I take it that Section 9594 of the Code would be no longer applicable. Section 2683 of the Code provides for the 'Turning over of papers and monies to a successor when there is a vacancy caused in any manner **except by death.**' Judge Boykin having died, this Section would apparently not apply.

"Briefly stated what I wish you to do is to let me have an opinion as to just how the funds now on deposit in our local banks to the credit of Matt A. Boykin, Probate Judge should be disbursed (as I am opening new accounts in my name as Probate Judge for all funds coming into my hands since my appointment). The State, the County, etc., are all very much interested in seeing that the heavy collections made through the Probate office during the month of November be disbursed as early as practicable.

Of course, as far as the penalties and citation fees due Mr. Zelnicker are concerned, these penalties and citation fees were paid to the Judge of Probate for Mr. Zelnicker's account at the same time the license was paid, but the funds were all deposited, as I understand it, in the bank with other funds collected by the Probate Judge.

"Your opinion for my guidance, and for the guidance of my Chief Clerk as well as for the guidance of the local banks is requested at your earliest convenience and will be most highly appreciated."

In a telephone conversation with you this date, you stated that all of the funds on deposit in the several banks in Mobile are **public** funds. This opinion will, accordingly, be confined to a consideration of your right, as the legally qualified successor of the late Judge of Probate, Matt A. Boykin, to withdraw these "public funds", and no consideration will be given to the legal propositions presented by the cases of **Enzor v. State,** 27 Ala. App. 60 (h.n. 3), 167 So. 336, cert. den. 232 Ala. 256, 167 So. 340; **First National Bank v. American Surety Co. of N. Y.,** 237 Ala. 35, 185 So. 365, or **Gladden v. Columbiana Savings Bank,** 235 Ala. 541, 180 So. 548.

It is my opinion that you, as the appointed and legally qualified successor, may properly withdraw the public funds in question.

By Section 2697(1) of the Code of Alabama, 1923, it is provided:

"2697. How offices are vacated.—Any office in this State is vacated—(1) By the death of the incumbent."

Under the foregoing section, upon the death of Judge Boykin, there existed a vacancy in the office of Judge of Probate.

This office has heretofore held that when such a vacancy exists the duties of the Judge of Probate are to be performed by his chief clerk, pursuant to Section 9594 of the Code of Alabama, 1923, and that funds deposited to the credit of the Judge of Probate may be collected by the chief clerk. (Quarterly Report of Attorney General, Vol. VI, page 100. Id. Biennial Report of Attorney General, 1936-38, page 123).

It appears from your inquiry that the chief clerk did not exercise this right before the vacancy was filled by the Governor under Section 9571 of the Code of Alabama, 1923. This being true, it became the duty of the chief clerk to deliver "all the books, papers, property, and money belonging or appertaining to such office to the lawfully qualified successor of the Judge of Probate."

By Sections 2689 of the Code of 1923 it is provided:

"2689. If in possession of any other person, proceedings to recover.—If any person holding any office in this state dies, or his office in any way becomes vacant, and any books, papers, or property belonging or appertaining to such office come into the possession of any person, the qualified successor to such office may, in the manner before prescribed in this article, demand such books, papers, or property from the person having the same in his possession, and on the same being withheld, an order may be obtained; and the person charged may, in like manner, make oath of the delivery of all such books, papers, and property that ever came into his possession; and in case of his failure to make such

oath and to deliver up the books, papers, or property so demanded, such person must be committed to jail, and a search warrant may be issued, and the books, papers, or property seized by virtue thereof and delivered to the complainant, as hereinbefore prescribed."

Accordingly, you, as the legally qualified successor of such deceased Judge of Probate, have acquired all of the rights and authority of the former Judge of Probate and of the chief clerk and are entitled to withdraw the public funds now on deposit in the several local banks as detailed. Cf. Biennial Report of Attorney General, 1928-30, page 917.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 14, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Cleburne County—Fine and Forfeiture Fund—

Under Local Act No. 415, H. 453, approved February 21, 1887 (Acts 1886-1887, page 859), fines assessed against defendants in criminal cases may be paid in claims against the fine and forfeiture fund, which have been properly registered under the provisions of said act, without regard to priority of registration. The officers collecting said claims in payments of said fines shall, within thirty days thereafter, pay same to the county treasurer, but the failure to make said payment within the thirty days does not preclude the treasurer from accepting same.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 12, 1940, in which you request my official opinion as follows:

"Please refer to Local Act No. 415, page 859, Local Acts 1886-1887, and advise me in answer to the following questions:

"1. The above section seems to make it mandatory upon the Treasurer to pay all claims in order of their registration. Does it also make it mandatory that claims surrendered by defendants to apply on payment of their fines (Local Act 1886-87, page 859) must be cancelled in order of their registration?

"2. If the Clerk fails to remit to the Treasurer the registered claims collected on fines within thirty days, must the Treasurer refuse to take such claims as payment of fines?

"3. Does this mean thirty days after the disposition of the case or within the time limit, or the life of an execution, upon confession of judgment?

"4. Does this local law imply that a defendant may purchase any registered claim against the Fine and Forfeiture Fund and apply said 'purchased claim' against their fine? (By this is meant such claims as those of Sheriff and Clerk)."

Before answering your specific inquiry, I wish to refer you to the case of **Reid v. Wallace,** 27 Ala. App. 199, 168 So. 900, where it was held that local acts authorizing payment of fines and forfeitures in certain counties with certain claims against the fine and forfeiture fund of those counties were not repealed by the adoption of Section 4038 of the Code of 1923, as amended. See also Quarterly Report of Attorney General, Volume XX, page 21.

Your first and fourth inquiries present the same question and will be considered together. In answer thereto, it is my opinion that under the provisions of Local Act No. 415, H. 453, approved February 21, 1887 (Acts 1886-1887, page 859), fines assessed against defendants in criminal cases may be paid with claims against the fine and forfeiture fund of Cleburne County, which have been properly registered under the provisions of said act, regardless of the priority of registration.

Sections 1, 2, 3 and 4 of said act provide for the proper procedure as to registration of claims against the fine and forfeiture fund of Cleburne County. Under these sections, unless the claims are so properly registered, they are forever barred and therefore have no effect as claims against the fine and forfeiture fund of said county. Therefore, in answer to questions 1 and 4, only those claims that are so properly registered will be considered.

Sections 5 and 6 of said act provide as follows:

"Section 5. Be it further enacted, That after the passage of this act the treasurer of Cleburne County shall pay all claims against the fine and forfeiture fund of said county in the order of their registration, but such as accrue before the passage of this act, and are registered under its provisions, shall be paid in the order of their former registration.

"Section 6. Be it further enacted, That the fines assessed against defendants in criminal cases and against defaulting witnesses, or jurors, or road defaulters, and all final judgments against defaulting defendants or their bail in said county, shall be collected only in such claims or debts against said fine and forfeiture fund as shall have been properly registered under the provisions of this act, or in money when collected in money, and it shall be paid over by the officers collecting the same within thirty days thereafter to the treasurer, who shall enter the same

to the credit of the fine and forfeiture fund, and keep the same separate and apart from the other funds in his hands, and if said fines or judgment shall be collected in a claim or claims against said fund, the same shall be paid over by the officer, collecting it as money within thirty days thereafter to the treasurer, who shall charge himself with it as money, cancel the claim or claims, mark it paid on the registry, and give himself credit for the same on the cash book as money paid out; **provided,** that nothing herein contained shall be so construed as to allow the payment of fines assessed against defendant convicted for carrying concealed pistol to be made in anything except money, as the law now requires."

It is true that under Section 5 all registered claims shall be paid in the order of registration. However, in my judgment, said Section 5 has no application to the payment of fines assessed against defendants in criminal cases with claims against the fine and forfeiture fund, as provided for in Section 6, supra.

The payment of fines with said claims under Section 6 is not, in my judgment, tantamount to paying the claims against said fine and forfeiture fund within the meaning of Section 5, supra. Section 5 contemplates the payment in cash of the claims against the fine and forfeiture fund. Section 6 provides that the payment of fines with claims against the fine and forfeiture fund, which have been properly registered, and makes no mention of the order of priority in regard to registration of said claims. Therefore, in my opinion, there is no limitation in this regard. It, therefore, follows that said fines may be paid with any claims against the fine and forfeiture fund which have been properly registered, under the provisions of the act in question, without regard to the priority of registration.

To hold that Section 6 is limited by the provisions of Section 5 to the effect that the claims can be paid only in the order of registration would virtually nullify the provisions of Section 6.

Since your second and third inquiries are so interrelated, the same will be answered together. In answer thereto, it is my opinion that under the provisions of Section 6, supra, the clerk of the court, when he collects registered claims against the fine and forfeiture fund in payment of fines assessed against the defendant and also cash money in payment of fines, he should within thirty days thereafter remit same to the county treasurer. This thirty-day provision, in my opinion, means thirty days after the collection of same by the clerk, without regard to the time of the disposition of the case or the life of an execution. It is further my opinion that the failure of the clerk to remit within said thirty days does not preclude the treasurer from accepting said claims as payment of fines. The mere failure of the clerk to follow the mandate of the statute would be merely a dereliction of duty on his part and would in no wise affect the duty of the county treasurer in regard to acceptance.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 18, 1940.

Hon. Wm. A. Conrad,
Clerk of the Circuit Court,
Mobile County,
Mobile, Alabama.

The Sheriff of Mobile County, under the amendment to the Constitution of 1901 submitted by General Acts, 1939, page 580, went on salary in lieu of fees on November 15, 1940, the day on which the result of the election was made known by proclamation of the Governor.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 3, 1940, in which you request my official opinion as follows:

"I respectfully request Your Honor's opinion on the following question, viz:

"What is the date the Sheriff of Mobile County goes on salary in lieu of fees?"

The answer to your inquiry involves a construction of Section 5 of Act No. 594, H. 1044, approved June 28, 1940, Local Acts, 1939, page 355. This act was enacted in anticipation of the adoption of the constitutional amendment proposed by Act No. 432, S. 488, passed by the Senate on September 5, 1939, and by the House of Representatives on September 12, 1939 (General Acts, 1939, page 580). Said amendment authorized the Legislature to place the Sheriff of Mobile County on a salary basis and also ratified and confirmed any acts theretofore passed placing said Sheriff on a salary basis.

Section 5 of Act No. 594, the enabling act, provides;

"Section 5. This Act shall become effective and operative immediately upon the proclamation of the Governor of the State of Alabama declaring that the qualified electors of the State of Alabama have ratified the Constitutional Amendment authorizing the Legislature to place the above-mentioned officer on a salary basis."

It will be seen from the foregoing provision that Act No. 594 is effective and operative immediately upon the proclamation of of the Governor of the ratification of the constitutional amendment in question. The records in the offices of the Governor and the Secretary of State reveal that the official canvass of the returns on the constitutional amendment and the statement of the Governor proclaiming said amendment ratified were filed in the office of the Secretary of State on November 15, 1940. If this statement of the Governor proclaiming the ratification of the constitutional amendment in

question can be said to amount to the "proclamation" prescribed by Section 5, supra, then Act No. 594 must be deemed to become effective on November 15, 1940.

The only inquiry presented for consideration, therefore, is whether this statement amounts to a "proclamation". A "proclamation" has been variously defined as "an official or general notice given to the public; an official public notification by some executive authority of the occurrence of an event important to the public, or of command, caution or warning in relation to a matter impending; a notice publicly given of anything whereof the executive thinks fit to inform and notify the public; a publication by authority; a public notice by an official of some order, intended action or some state of facts." 50 Corpus Juris 624. Webster defines a "proclamation" as follows: "A public notice by an official of some order, an intended action or some state of facts."

It will be seen from the foregoing definitions that a "proclamation" is a "notice" which must be "official" and "public".

The statute here under consideration merely requires a "proclamation." No specific mode is prescribed.

Following the direction of the statute, that that proclamation be given, the Governor, as hereinabove noted, has filed with the Secretary of State his statement that the amendment was ratified. This statement being filed in the office of the Secretary of State, all persons desiring it could have access to it. In this respect the "proclamation" became "public" and "official". Code of Alabama, 1923, Section 778. It is my opinion that the necessary public notice and the proclamation required by Act No. 594 was given on November 15, 1940, the date of such proclamation.

The above conclusion is based on the opinion of the Supreme Court of the United States in **Lapeyre v. U. S.**, 17 Wall. 191, 21 Law. ed. 606, and in **Dickinson v. Paige**, 179 S. W. 1004, 120 Ark. 377. In the former case it was held that a proclamation of the President was sufficiently public by applying the seal and depositing the instrument in the office of the Secretary of State where all persons desiring it may have access to it and procure authenticated copies. In the latter case it was held, under a constitutional provision requiring that the Governor give notice of his actions by "a public proclamation', that the filing with the Secretary of State was sufficient.

Additional authority is found in **Smith v. State**, 223 Ala. 11, 136 So. 265. This case dealt with legislative enactments relating to the establishments of the Agricultural Code of Alabama of 1927. It was provided in the act adopting the Agricultural Code that the day fixed for its going into effect was the 30th day after the Governor's proclamation and it was contended before the court that the Code was not effective for the reason that the Governor had never proclaimed the publication of the Code, and since the act provided that the Code should go into effect the 30th day after the date of the Governor's proclamation announcing this publication, it never became operative.

Speaking to this question the court, in a per curiam decision, stated:

"Public officials are presumed to do their duty, and it will be assumed, therefore, especially in view of the language of the preamble using the words of the act, that the day fixed was the 30th day after the 'Governor's proclamation announcing its publication', and that the proclamation itself was sufficient evidence of the announcement by the Governor of its publication."

The logic of the **Opinion of the Justices In Re Warrant Amendment,** 227 Ala. 296, 149 So. 781, also supports the foregoing conclusions.

It is my opinion, therefore, that Act No. 594, supra, became operative and effective on November 15, 1940, the date of the proclamation of the Governor, as above defined, of the ratification of the constitutional amendment in question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 19, 1940.

Hon. G. E. Hill, Chairman,
DeKalb County Board of Revenue,
Fort Payne, Alabama.

1. Under Local Act No. 255 (Local Acts of 1939, page 147), the Board of Revenue of DeKalb County had authority to purchase automobiles to be used in the construction, maintenance and inspection of roads and bridges.

2. Members of said Board are not entitled to draw mileage under said Local Act.

3. Members of said Board may use the automobiles so purchased in the inspection of roads and bridges only.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of November 14, 1940, in which you request my official opinion as follows:

"I am Chairman of the DeKalb County Board of Revenue and the question has come up as to the legality of the purchase by the county of three automobiles for the use of the members of the Board of Revenue in

their performance of the duties and also for other purposes in connection with the road building program of this County. These cars are used by the Members of the Board of Revenue in looking after the road program of the county. They do not have a road foreman, as the various members of the Board of Revenue with these automobiles, have been able to save the county the expense of a foreman. We have in this county over four thousand miles of county roads to be looked after and they are in various sections of the county and if we had to hire a road foreman we would still have to have the automobiles for these foremen, as they would have to travel over the various parts of the County to look after the roads and consequently if these cars are allowed to be used by the Members of the Board of Revenue, it would mean a savings to the county of about four or five hundred dollars per month and this duty is assumed by the various members of the Board which is not made mandatory on them but they feel that in saving this amount for the county by dispensing with the road foreman it will allow more money for the county for other purposes. These cars are used to transport tools, dynamite, repair parts and other materials and they serve the same purpose as a pick up truck and they are for the use of the Members of the Board of Revenue in the performance of their duties as required of them by law in addition to the duties that they perform as road foremen, which is not required of them.

"You are advised that the title to the cars is in the county and they do not belong to the Members of the Board of Revenue. The tags are county tags and the insurance on the cars is taken out by the county in the name of the county and the cars were bought by the Board of Revenue as a whole and not by the individual members.

"You are also advised that this county is operating under a local act passed by the Legislature and the act became a law August 30, 1939, under Section 125 of the Constitution and is almost identical with the Morgan County Board of Revenue Act which was held constitutional by the Supreme Court. This Act can be found on page 147 Local Acts, 1939, Act 255, House Bill 405.

"You are advised that Section 18 of this Act provides 'That the Members of the Board of Revenue, other than the Chairman shall receive $5.00 per day while actually engaged in the business affairs of the County and attending court, ect.'

"You are advised that I desire your opinion on the following subjects based upon the facts stated in this letter which are as near correct as they can be determined.

"1. Whether or not the purchase of these cars under the above conditions are legal purchases by the county and can be used as outlined.

"2. Whether or not if the county cannot purchase the cars for the members of the Board of Revenue, as stated in this letter, whether or not under the provisions of the local act, Section 18, Act 255, House Bill 405, page 147, the Members of the Board of Revenue would be entitled to draw mileage."

The facts, briefly summarized, as set forth in your inquiry appear to me to be as follows:

The Board of Revenue of DeKalb County was created by and is operating under Act No. 255, (Local Acts, 1939, page 147); that the Board of Revenue has purchased three automobiles which are being used generally by various county employees in the construction and maintenance of highways and bridges; that said automobiles serve the purpose of pick up trucks in transporting road and bridge materials and supplies over the county, and that the members of the Board of Revenue sometimes use these automobiles in the performance of their duties of inspecting the roads and bridges. Under these statements of fact, you desire to know, first, would the Board of Revenue of DeKalb County have the legal authority to purchase these automobiles, and, second, are the members of said Board entitled to draw mileage.

Sections IX and X of your Local Act read as follows:

"Section IX. That said Board shall have all of the jurisdiction and all the powers which are now or may hereafter be by law invested in the Board of Revenue or Commissioners Courts of this State and the several members of the said Board of Revenue of DeKalb County shall respectively perform all the duties and services and render all the powers which are or may be required by law of the members of the Board of Revenue or Commissioners Courts."

"Section X. That all the general laws heretofore and hereafter enacted by the Legislature of Alabama, in relation to the jurisdiction powers, authorities or duties of Board of Revenue or Commissioners courts in this State shall apply to said Board of Revenue of DeKalb County, except so much of the general laws as may relate to the mode of selection of said Board of Revenue, provided that this Act shall not be construed to impair the jurisdiction and authority of said Board."

From this it appears that your Board of Revenue has the same jurisdiction and power in reference to roads and bridges as other like governing bodies which operate under the general laws of Alabama. Under Sections 1397 (110) and 6754 of Michie's 1928 Code, Boards of Revenue and other like governing bodies possess original and unlimited jurisdiction in reference to the establishment, construction and maintenance of roads and bridges in their respective counties. **Biennial Report of Attorney General 1936-38,** page 647.

I am of the opinion that under the authority and powers possessed by your Board and the facts stated in your inquiry, the purchase of these automobiles was legal. I arrived at this conclusion for the reason that in the case of **Ensley Motor Car Company v. O'Rear, Treasurer,** 196 Ala. 481, 71 So. 704, it appears that the Court of County Commissioners of Walker County had purchased a car from the Ensley Motor Car Company to be used in the construction, maintenance, and inspection of roads and bridges by the county engineer or inspector, and had issued a warrant in payment of said car. That after the warrant had been issued the county treasurer, O'Rear, refused to pay the same upon the ground that the Commissioner's Court had no authority

to make the purchase. The case went to the Supreme Court of Alabama which held that the treasurer should pay the warrant and made the following announcement:

> "Under General Acts, 1915, p. 573, Sections 1, 5 and 9, the commissioners court of a county has authority to purchase and maintain an automobile for use in maintaining and inspecting the roads and bridges of a county, and having issued a proper warrant therefor, such warrant should be duly registered and paid by the county treasurer as required by law."

This proposition of law was later affirmed by the Supreme Court in the case of **Yielding v. Ball, et al,** 205 Ala. 376, 87 So. 785.

I am also convinced that the fact that the members of your Board sometimes use these automobiles in the performance of their duties of inspecting the roads and bridges of your county does not make the purchase of the same illegal. In the Yielding case, supra, which was from Jefferson County, it seems that the officers of that county had been changed from a fee basis to that of a salary and that the Board of Revenue had purchased cars to be used by the various county officials in the performance of their duties. It also appeared that Jefferson County was paying the expenses of operating these cars. This case also went to the Supreme Court which not only reaffirmed the holding in the Ensley Motor Car case, to the effect that a county could purchase a car to be used in the construction, maintenance and inspection of roads and bridges, but in addition thereto held that Jefferson County had the authority to purchase such cars and to pay the expenses of operating the same, and that the furnishing of such transportation to county officials while performing their duties was not added compensation. I quote from the Yielding case:

> "Jefferson is a large county, approximately 50 miles in length and 28 miles in breadth, with a population of practically 300,000. It underdent a great change when these officials were placed on a salary and their fees and commissions deposited in the county treasury. It will not be considered for one moment that the Legislature expected them, out of their salaries, to pay their expenses, some almost daily, going to different parts of the county. If so, the salaries of some, if not all, would be practically consumed in such expenses.
>
> "When the Legislature directed the board of revenue of Jefferson County to pay 'the cost of the conduct and operation of such offices,' and 'to adopt rules and regulations for the conduct and operation of all such offices, made necessary by changing the method and basis of compensation under this act,' it expressly or impliedly authorized them to provide transportation for the officers when in the discharge of their official duties, with the limitation hereinbefore stated, the office to be no expense during the term to the county. The fees and commissions collected therefrom must pay or overpay all expenses of the office."

In answering your inquiry regarding mileage for the members of your Board, I wish to advise that I am of the opinion that they are not entitled to the same. Section XVIII of your Local Act prescribes the amount of compensation to be received by such members and reads as follows:

"Setion XVIII: The Chairman of said Board of Revenue shall receive a salary of $1800.00 per annum, payable in monthly installments of $150.00. The Chairman of the Board shall be the presiding officer and in addition to the rights, powers and duties designated in this Act, he shall exercise and perform all other rights and duties in relation to the Board of Revenue, and shall be liable to the same penalties in connection therewith as are now exercised by the Judges of Probate of the several counties of this State as provided under the general law of the State, in relation to the Court of County Commissioners. He shall issue warrants to all persons whose claims have been allowed by the Board of Revenue and in the same manner and under the same restrictions as same have been heretofore issued by the Judge of Probate of DeKalb County. The members of said Board of Revenue, other than the Chairman, shall receive $5.00 per day while actually engaged in the business affairs of the County and attending court and shall have the supervision, inspection, superintendence and general oversight of all work done of the public roads and highways of DeKalb County, Alabama, and of their respective districts as required of them by law and which duties are hereby made mandatory. All of said salaries and compensation to be paid out of the County Treasury on sworn itemized verified statement of each of said Board members to be approved by the Board of Revenue as other claims as above provided to be filed and recorded as other claims."

It will be observed that nowhere in said Act is there a provision authorizing the payment of mileage. It is a well-known principle of law that any officer claiming a fee, commission or other compensation, must be able to point to some specific authority for the same. **Quarterly Report of Attorney General, Volume XV**, page 297.

Since the members of your Board are not entitled to draw mileage, and under your Local Act it is their mandatory duty to supervise, inspect, and superintend all work done on the public roads and highways of DeKalb County, I am of opinion that they may use these automobiles while performing such mandatory duties in reference to the roads and bridges of DeKalb County, but for no other purposes.

This opinion is not in conflict with the one rendered to the Commissioner's Court of Colbert County under date of February 27, 1929 (Biennial Report of Attorney General, 1928-30, page 205), for the reason that the opinion herein written is based upon a Local Act applicable to DeKalb County only.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 20, 1940.

Hon. James A. McCollum,
Solicitor, Tuscaloosa County,
Tuscaloosa, Alabama.

Assistant Circuit Solicitor—Deputy Solicitor—Attorney License and Exemptions—

1. The office and duties of Assistant Circuit Solicitor as prescribed by Section 5525 of the 1923 Code of Alabama is without any field of operation pending the proclamation of the Code of 1940 or reclassification of judicial circuits under the 1940 Federal census as suspended by Act No. 233, S. 221, approved August 16, 1939, (General Acts, 1939, page 388).

2. The office of Deputy Solicitor provided for in Sections 10 and 11 of Act No. 228, H. 707, approved August 3, 1927 (Local Acts, 1927, page 130), is a separate, distinct and independent office from that provided for in Section 5525 of the Code fo 1923.

3. A Deputy Solicitor is not liable for the annual attorney's license, when he does not engage in private practice of law.

Opinion by Assistant Attorney General Hare.

Dear Sir:

Your letter of December 9, 1940, in which you request my officail opinion, is as follows:

"Will you please give me an opinion on the following questions at your earliest convenience?

"1. Is Section 5525 of the Code of Alabama of 1923 the law at the present time?

"2. Are Sections 10 and 11, page 133 of the Local Acts of Alabama of 1927 the law at the present time?

"3. Is the office of Deputy Solicitor of Tuscaloosa County, Alabama, provided for in Sections 9 and 10, page 133 of the Local Acts of Alabama of 1927 and the office of Assistant Circuit Solicitor provided for in Section 5525 of the Code of Alabama of 1923 one and the same office or are they two separate, distinct and independent offices?

"4. Is the Deputy Solicitor of Tuscaloosa County, Alabama, liable for the annual attorney's license where he does not engage in the business of practicing law except in the discharge of his official duties?"

In reply to your first question, I have checked Section 5525 of the 1923 Code and no amendment or repeal is noted. It is the law but has no present field of operation. (See reply to inquiry no. 3.)

In reply to your second question, Sections 10 and 11 of Act No. 228, H. 707, approved August 3, 1927 (Local Acts, 1927, page 130), have not been amended since the passage of this act, nor their legality adjudicated since that time.

In your third question you refer to Sections 9 and 10 of Act No. 228, cited supra, but on examination I find that Section 9 is not applicable at all to the deputy solicitor, and I assume that you intended to refer to Sections 10 and 11 dealing with this office in this act. The opinion therefore is confined to an interpretation of Sections 10 and 11.

The office provided for in Sections 10 and 11 of Act No. 228, supra, and the office provided for in Section 5525 of the Code of Alabama, 1923, are separate, distinct and independent offices. Section 5525 as it appears in the Code of 1923 derives from Act No. 116, H. 100, approved October 5, 1920 (General Acts, 1920, page 161). It should be noted that this Act as originally passed was restricted in its application to judicial circuits "composed of one county only which has a population of 65,000 inhabitants and not more than 95,000 inhabitants, according to the last Federal census, or any subsequent census."

Under the Federal census of 1910 only the counties of Mobile and Montgomery came within the population classification of the act. Under the Federal census of 1920 Mobile grew out of the classification, leaving Montgomery the only county affected by the status referred to, supra. Under the Federal census of 1930 there was no county within the prescribed population classification.

I call your attention to Act No. 233, S. 221, approved August 16, 1939 (General Acts, 1939, page 388), which reads as follows:

> "That the nineteenth day after the first day of the first regular legislative session held next after the publication by the Federal Government of the regular Federal Decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census."

Even though Tuscaloosa County should come within the classification of Section 5525 of the 1923 Code upon proclamation of the 1940 census, under the provision of the Act quoted supra, the operation of Section 5525 would be suspended until the time mentioned in said Act. Since the Code of 1940 will be proclaimed before the limit of time of the suspension provided in Act No. 233, supra, and th Code of 1940 does not include the provisions of Section 5525 of the Code of 1923, there is no possibility that Tuscaloosa County will ever come within its provisions.

In reply to your fourth inquiry, the deputy solicitor of Tuscaloosa County is not liable for the annual attorney's license where he does not engage in

the private practice of law. See **Volume 12, Reports of Attorney General, Office Edition,** page 286, opinion rendered to Hon. W. B. Harrison, Secretary, Board of Commissioners of the State Bar, under date of December 9, 1932; and **Volume 16, Reports of Attorney General, Office Edition,** page 191, opinion to Hon. S. H. Blan, State Treasurer, under date of November 18, 1933. For your convenience copies of the above cited opinions are enclosed.

It is to be noted that Section 21 of Act No. 133, H. 412, approved August 9, 1933 (General Acts, 1923, page 100), as amended by Act No. 241, S. 85, approved June 6, 1931 (General Acts, 1931, page 284), was considered in the above cited opinions. At that time, the license on attorneys was levied by Section 11 of Act No. 133, supra, as amended by Act No. 241, supra. It was later levied by Schedule 10 of the 1935 Revenue Act, and is now levied by Act No. 551, S. 329, approved September 19, 1939 (General Acts, 1939, page 871), which further amended Section 11, as amended, supra.

It is the opinion of this office however, that these changes in the statute levying the license on attorneys do not affect the holdings of the opinions cited supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 23, 1940.

Hon. F. H. Shamblin,
Tax Assessor, Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—Board of Equalization—General Acts, 1939, p. 178.

Board of Equalization is without authority to reopen assessment after the expiration of the tax year which begins on October 1st and ends September 30th in absence of fraud or lack of jurisdiction.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of December 16, 1940, in which you request my official opinion as follows:

"Last year the new Board of Equalization in adjusting taxes agreed with the tax payer on a certain reduction and failed to properly enter this agreement on the Tax Assessor's books, when the tax payer came in to pay his taxes, naturally they were more than they expected. In some instances the tax payer signed the assessment sheet thinking he was signing for a reduction, but later found out the entry was not properly made as agreed upon.

"The Board of Equalization wants to correct this error, but they seem to have no law backing them up in this matter.

"Please informe me as to how this error can be corrected and who is supposed to correct it.

"It is very urgent that I get this opinion immediately as these people want to pay their taxes before January 1, and avoid penalty."

In answer to your inquiry, I am of the opinion that the Board of Equalization is without authority to reopen an assessment for the purpose of lowering the assessment theretofore made in the absence of fraud or lack of jurisdiction.

You, as Tax Assessor, are governed by the provisions of Section XVIII of Act No. 143, S. 14, approved March 15, 1939, (General Acts, 1939, p. 178), which provides:

"Section XVIII. When the work of hearing objections against values fixed on taxable property shall have been completed by the Board of Equalization, the Tax Assessor shall enter upon the tax return lists the corrected values, if any changes have been made therein, **which changed or altered value shall be the taxable value of the property or properties,** unless an appeal is taken as herein provided, or unless otherwise ordered by the State Department of Revenue." (Emphasis supplied.)

The place and time authorizing the County Board of Equalization to pass upon protests duly filed by tax payers is governed by the provisions of Section XVII of Act No. 143, supra, which provides:

"Section XVII. For the purpose of hearing objections filed in writing to any assessments or valuations fixed as provided for herein, the Board of Equalization shall sit at the court house in their respective counties on the first Monday in June in each year, from 9 A.M. to 5 P.M., **and shall continue as long as may be necessary, provided such sitting shall not be extended beyond the second Monday in July, unless otherwise ordered by the State Department of Revenue,** to dispose of all cases where objections to valuations or assessments have been filed in writing by any taxpayer, as provided in this Act. * * *" (Emphasis supplied.)

In the case of **State v. Doster-Northington Drug Co.,** 196 Ala. 447, 71 So. 427, the Supreme Court held:

"This court has held that the tax year commenced on October 1st and ended September 30th.—**Frost v. State,** 153 Ala. 654, 45 South. 203; **Hooper v. State,** 141 Ala. 111, 37 So. 662.

* * *

"If the State through its duly constituted officers has exercised the final power of assessment and valuation of property, the determination is in its nature judicial; and unless impeached for fraud or lack of jurisdiction, or reviewed by appellate authority, it is final.

"The reasonable construction of the power of assessment of taxes, and of the review thereof, should be to the end that a stable and uniform system prevail in the state; and so, when annulment or review is not sought within the period of the tax year, that matured assessments shall be binding alike on the tax-payer, and on the taxing authorities."

This office has heretofore ruled that the Board of Review (Board of Equalization) has no authority to consider a tax assessment after the close of the tax year in which said assessment is made unless impeached for fraud or lack of jurisdiction.

Biennial Report of Attorney General, 1934-36, pp. 398, 468;

Biennial Report of Attorney General, 1936-38, p. 676;

Daffin v. Scotch Lumber Co., 226 Ala. 33, 145 So. 452;

Marre v. State, 200 Ala. 278, 76 So. 44;

Cf. Quarterly Report of Attorney General, Vol. XIX, pp. 247, 250:

Cf. Biennial Report of Attorney General, 1930-32, p. 275.

The premises considered, I am of the opinion that since the tax year has expired the assessment has become final, and there is no authority vested in any officer or board to reopen the assessment in the absence of fraud or lack of jurisdiction.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 23, 1940.

Hon. Felton W. Garrick,
Clerk, Circuit Court,
Clarke County,
Grove Hill, Alabama.

The Clerk of the Circuit Court in a criminal case which has been nol prossed should proceed to make a final record of the case and would be entitled to the usual fees for making such record.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 14, 1940, in which you request my official opinion as follows:

"Please advise me as to whether or not I should make a final record in a criminal case that has been nol-prossed, and, if so, whether or not I am entitled to the usual fees provided for making final records in such cases.

"As I understand the matter, final record must be made within six months after the final determination of any suit or prosecution, and since, as I understand it, when a case is nol-prossed it is finally determined, it seems to me that I would be required to make a final record of such a case, and would be entitled to the usual fees for making the same.

"Your advice in the premises will be appreciated."

•

I am of the opinion your request should be answered in both instances, in the affirmative. I call your attention to Section 6724, Sub-section 9, Code of Alabama, 1923, which is as follows:

"To record in well-bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under section 10129 (5736), except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions."

You will note the expression in the above, "after the final determination of any suit or prosecution, etc.", and if a case is nol prossed, this would be a final determination of such prosecution as far as this particular case is concerned.

Therefore, I am of the opinion you should make a final record of the case and you would be entitled to the usual fee for doing so. In order for you to be advised just what papers and proceedings should go in the final record, it might be well for you to read carefully the case of **Carmichael, President v. Matthews, Clerk,** 134 Ala. 210, 32 So. 681.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 23, 1940.

Hon. Ed Miller,
Sheriff, Blount County,
Oneonta, Alabama.

Inferior Courts — Blount County —

Term of office of Judge thereof —

The Judge of the Inferior Court of Blount County, who was elected at the general election in November, 1940, entitled to assume

office as soon as the result of the election is declared and he has qualified.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 14, 1940, in which you request my official opinion as follows:

"I request the following official opinion:

"Under Local Acts of 1931 at page 228 creating an Inferior Court of Blount County, when does the newly elected judge take office?

"The defeated judge of said Court and the newly elected one both claim to be the judge. The defeated judge says the new judge is to take office on the 20th day of January, 1941, the same time as other officers will take their places. The newly elected judge says that he is now judge under the said act as he was elected and has qualified and received his commission."

It is my opinion that Sections 2 and 3 of the Act creating the Inferior Court of Blount County, which is Act No. 461, H. 1076, approved July 17, 1931, (Local Acts, 1931, page 228), must be considered in determining this question. These sections read as follows:

"Section 2. BE IT FURTHER ENACTED, that there shall be a judge of said Court. The judge shall at the time of his appointment or election have been a resident of said County for at least one year, and shall at the time of his appointment or election be at least twenty-five years old. **He shall hold his office for a term of four years and until his successor is elected and qualified.**" (Emphasis supplied.)

"Section 3. BE IT FURTHER ENACTED, that thirty days after the passage and approval of this act there shall be appointed by the Governor a judge of said Court, **who shall hold office until the next general election at which justices of the peace are elected, and until his successor is elected and qualified. At such general election and every four years thereafter there shall be elected by the qualified voters of said Blount County a judge of said inferior court of said County.** Vacancies in the office of judge of said court shall be filled by appointment of the Governor whose term of office shall be the unexpired term of his predecessor and until his successor is elected and qualified." (Emphasis supplied.)

It is to be noted from the above quoted sections that the time for the beginning of the term of office of the Judge of said court is not definitely fixed. The Supreme Court of Alabama in the case of **Prowell vs. State,** 142 Ala. 80, 39 So. 164, has spoken directly to such a situation in the following language:

"Unless some other time is fixed for the beginning of a term of office, the general presumption is that the official term dates from the legal ascertainment of the result of the election, and the officer assumes the duties of the office as soon thereafter as he can qualify and receive his commission.—**Atty. Gen. ex rel Haight v. Love,** 39 N. J. Law Rep. 476; Throop on Public Officers, Sec. 314; Lawson's Rights & Remedies, Sec. 2807."

Premises considered, it is my opinion that the term of the newly elected Judge of the Inferior Court of Blount County, Alabama, began on the date of the legal ascertainment of his election, and that he was entitled to assume the duties of the office as soon thereafter as he qualified and received his commission, Cf. **Betts vs. Ballentine,** 172 Ala. 325, 55 So. 814.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 23, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Capitol.

Mobile County — Board of Revenue and Road Commissioners — Superintendent of Public Roads —

The governing body of Mobile County is authorized to furnish its superintendent of public roads and its foremen automobiles, and to maintain the same, for use in their work in maintaining and inspecting such roads.

Local Acts 1907, p. 728.

Code of 1923, Sections 6754, 6770.

Acts 1927, p. 391.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated April 19, 1940 follows:

"Local Acts 1907, page 727, Section 3, provides for the election of a superintendent of roads. 'The salary shall be set by the Board, same shall cover all compensation and expenses to which said superintendent

shall be or become entitled to by virtue of his office.' 'Local Acts 1911, page 289, amends the Act of 1907, but does not change the status of the superintendent of roads.' The Board of Revenue and Road Commissioners of Mobile County has been furnishing the superintendent with an automobile, also they have, and are furnishing the several foremen with automobiles in addition to salaries paid.

"1. Has the Board of Revenue and Road Commissioners of Mobile County authority to furnish said superintendent with an automobile, and maintain same for him?

"2. Has the Board of Revenue and Road Commissioners of Mobile County authority to furnish their several foremen with automobiles, and maintain same for them?"

In **Ensley Motor Car Co. vs. O'Rear, Treasurer,** 196 Ala. 481, 71 So. 704 (1916) it was held that a county governing body, by virtue of its statutory, plenary jurisdiction over roads and bridges, had power to purchase and maintain a motor car for use in maintaining and inspecting county roads and bridges.

Said the Court:

"In the location, erection, repair, or removal, or in the furnishing of the county's buildings, bridges, and roads, the court of county commissioners or board of revenue have a discretion that cannot be exercised for them by any other county official, or directed by any court, except only when their acts are such as amount to fraud, corruption, or unfair dealing. In the performance of these statutory duties, boards of revenue and courts of county commissioners exercise a function that is quasi legislative."

(Citing authorities)

Again, on page 485 of the opinion of the court, it was observed:

"So also, if the necessary material, equipment, and labor, for the proper construction and maintenance of the public roads, bridges, and ferries may be purchased or engaged, and the services of a competent engineer or inspector are required to construct or supervise such public improvements, there can be no doubt of the right to contract therefor. And if the right exists to contract for their inspection and supervision, then the right to maintain, and to **transport such inspectors from one portion of the county to another, in the discharge of this public service, cannot be doubted."** (Emphasis supplied).

The power is more broadly asserted in Section 157 of the State Highway Act, approved August 23, 1927 (Gen. Acts 1927, p. 391) as follows:

"The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this State have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and

executive powers, except as limited in this article. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state."

It is to be noted, of course, that the jurisdiction may be limited by the local or special statutes of the state.

So in **Court of Com'rs of Pike County v. Johnson,** 229 Ala. 417, 157 So. 481 with reference to the jurisdiction of the county governing body as above stated, it was observed:

"Local laws are recognized as remaining in force, and, as of course, new local laws may repeal expressly or by implication the general laws in conflict therewith."

This leads to consideration of the effect to be given to that part of Local Act No. 588, S. 479, approved August 2, 1907 (Local Acts 1907, p. 727), creating the office of Superintendent of public roads in Mobile County, reading as follows (Sec. 2):

"The salary of said superintendent shall be fixed by said board, but the same shall be not less than eighteen hundred dollars ($1800.00) per annum * * * which shall cover all compensation and expenses to which said superintendent shall be or become entitled to (sic) by virtue of his office."

I am of opinion that the automobiles furnished the superintendent and his foremen for use in the prosecution of their duties in maintenance and inspection of roads are to be considered merely as a part of the county's equipment for use in road work. They are a part of such equipment in the same sense that picks, shovels, steam rollers, etc. are equipment.

Provision by the county of such motor vehicles to be used by the superintendent and foremen for the more efficient prosecution of their duties and work cannot in any proper sense be regarded as additional compensation or reimbursement of expense incurred by them.

The county governing body may, in my opinion, in the exercise of its discretion and plenary jurisdiction as to roads very properly furnish its workmen and superintendent such facilities for the efficient prosecution of their work, and without conflict with the local act aforementioned.

This opinion is based on the assumption and understanding that the automobiles in question are the property of the county; and are to be used exclusively in the performance of official road and bridge duties and not for any personal use whatsoever.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 30, 1940.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

The Inferior Court of Huntsville — Costs and Fees — Department of Corrections and Institutions.

The costs that are properly chargeable in the Inferior Court of Huntsville in cases of final jurisdiction in that court discussed.

The items of costs payable by the Department of Corrections and Institutions under Section 3667, Code of Alabama, 1923, where defendant is sentenced to hard labor for the county discussed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 27, 1940, in which you request my official opinion as follows:

"Recently I sent you a request for a ruling in connection with certain costs to be charged in certain instances in the Inferior Court of Limestone County. It appears that a similar situation of uncertainty exists in connection with the Inferior Court of Huntsville, Madison County.

"In connection with the Inferior Court of Huntsville I should like to have you advise me in answer to the following question:

"What fees are legally and properly payable by the State Department of Corrections and Institutions, under Section No. 3667 of the 1923 Code, when a defendant is sentenced to Hard Labor for an offense over which this Inferior Court has final jurisdiction?

"With reference to the local acts dealing with this Court and other matters pertinent to this request I am attaching, herewith, a letter from an Examiner of Accounts who has been assigned to audit this Court."

The letter of the Examiner of Accounts which is attached to your request asked for a clarification of an opinion of this office found in Quarterly Report of Attorney General, Volume II, page 301. Said opinion holds that sheriffs' fees, inferior court fees and witness fees in the Inferior Court of Huntsville are payable by the Convict Department (now the Department of Corrections and Institutions) under Section 3667 of the Code of 1923, in cases of final jurisdiction in said court where the defendant is sentenced to hard labor for the county.

In the request for said opinion, the particular items of cost that were enumerated. However, in the opinion proper these particular items were

not considered specifically. The questions asked were answered generally. Herein said opinion is misleading and should be clarified. Therefore, I will take this opportunity to discuss the question of costs that are properly chargeable in said court in cases of final jurisdiction and what items are payable by the Department of Corrections and Institutions under Act No. 564, S. 473, approved October 6, 1923 (General Acts, 1923, page 735) which appears as Section 3667, Code of Alabama, 1923, where a defendant is sentenced to hard labor for the county. Act No. 564, supra, will be referred to in this opinion as Section 3667 of the Code of 1923.

It should here be noted that said opinion also holds that solicitor's fees are not payable by the Convict Department and that the amendment of Section 23 of the act creating said court by Local Acts of 1923, page 54, is constitutional. The question of the solicitor's fees in said court is now a moot question in view of Act No. 320, H. 777, approved September 1, 1939, (Local Acts, 1939, page 208) which amended Section 23 of the 1911 act creating said inferior court by providing that no solicitor's fees should be tax or collected in any criminal case in said court.

The Inferior Court of Huntsville was created by Act No. 213, S. 434, approved April 4, 1911 (Local Acts, 1911, page 215). Said court was established in lieu of all justices of the peace and notaries public with powers of justice of the peace in Precinct 1, Madison County, Alabama. In said act the Judge of said court was given no power to sentence a defendant to hard labor for the non-payment of costs, as his jurisdiction in this respect was the same as a justice of the peace. (See Section 3849, Code of Alabama, 1923). The 1911 act, supra, has been subsequently amended several times, but none of these amendments are here material except an amendment of Section 6 of the 1911 act by Act No. 77, S. 138, approved March 2, 1931, (Local Acts, 1931, page 19), and the 1939 amendment above referred to.

Section 6, as amended, provides as follows:

> "Section 6. Said Judge shall have and exercise the same powers and authority that are now by law conferred on Justices of the Peace or may hereafter be conferred on them and shall have power and authority to sentence to hard labor for the county for non-payment of costs any person or persons convicted in said court; he shall have the right to solemnize the rites of matrimony, administer affidavits or oaths, take acknowledgements of deeds, mortgages and other conveyances, and take recognizances."

It will be noted that the Judge of said court now has the authority to sentence to hard labor for the county for non-payment of costs of any person or persons convicted in said court. When so sentenced, said convicts are sent to the penitentiary under the provisions of Section 3 of Act No. 72, S. 100, approved February 18, 1927 (General Acts 1927, page 52). When received by the Convict Department (now the Department of Corrections and Institutions) it should pay the items of costs as provided for by Section 3667, Code of 1923, supra, the same as in felony cases.

The first question to be considered is what costs are properly chargeable in the Inferior Court of Huntsville in cases of final jurisdiction wherein a defendant is convicted. Section 12 of the 1911 act, supra, provides as follows:

> "Sec. 12. The fees and costs of said court shall be the same as are now allowed by law to justices court of this State and shall be collected by the clerk of said court. All of the costs and fees so collected by him shall be paid into the treasury of Madison county once in every month."

It will be seen from the above that the same fees are chargeable in said court as in justice courts. In cases of final jurisdiction in said courts the fees chargeable generally are governed by Sections 3753 and 3756 of the Code of 1923, dealing with the schedule of fees of justices of the peace and constables, respectively. The witness fees in said court are governed by Section 3771 of the Code of 1923. In instances where the Sheriff serves processes in justice courts the fees allowed are governed by Section 3741 of the Code of 1923, which is the schedule of fees for sheriff. Quarterly Report of Attorney General, Volume XV, page 106; **Trapp v. State ex rel Burgin,** 122 Ala. 394, 25 So. 194. Section 3755, Code of 1923, has no application to costs in justice courts in cases of final jurisdiction, as same is applicable only to preliminary proceedings.

In view of the above, it therefore follows that the fees properly chargeable in final jurisdiction cases in the Inferior Court of Huntsville are governed by the sections above referred to.

The question now presents itself as to what items of costs are payable by the Department of Corrections and Institutions under Section 3667, Code of 1923, supra, when a defendant is sentenced to hard labor for the county. The Department of Corrections and Institutions is authorized to pay only those items of costs enumerated in Section 3667, Code of 1923, supra. Any items of costs that were properly chargeable, but are not enumerated in Section 3667, cannot be paid by the Department of Corrections and Institutions. Only those items of costs that are properly chargeable and also set out in Section 3667 can be paid by said department. In some instances, the items of costs that are properly chargeable and those set out in Section 3667 are the same but vary as to the amount. In these instances, if the amount properly chargeable is greater than the amount set out in Section 3667, only the amount set out in Section 3667 can be paid. Also, where the amount set out in Section 3667 is greater than the amount properly chargeable, only the amount properly chargeable can be paid by the Department of Corrections and Institutions.

Where a constable performs services in said court, his fees are governed by Section 3756, Code of 1923, supra. Under Section 3667 there is no provision for the payment of constable's fees except that portion which reads as follows:

> "Costs of committing magistrate and constables **or** preliminary trial, both together not to exceed five dollars;" (Emphasis supplied.)

It, therefore, follows that constable's fees properly chargeable may be paid under Section 3667 up to $5.00. The constable's fees are not limited to preliminary hearings, in view of the fact that the word "or" is used rather than the word "on." Cf. **Biennial Report,** 1934-1936, page 798. This use of the word "or" rather than the word "on" is not an error, as the original journals on file in the office of the Secretary of State show that the word "or" was used in Act No. 564, S. 473, approved October 6, 1923 (General Acts, 1923, page 735), supra. Said act appears in the Code of 1923 as Section 3667, although said act is the statutory law of the state rather than Section 3667 of the Code of 1923, as said act was passed after the date of the adoption of the Code, i.e., August 17, 1923. However, Section 3667, as the same appears in the Code of of 1923, is in the exact language of Act No. 564, supra. I might call your attention to the fact that in the Code of 1940, which will soon become effective, the section that will correspond to Section 3667 will contain the word "on" rather than the word "or". This will have the effect of confining constable's fees payable under said section to preliminary trials.

The above quoted portion of Section 3667, supra, does not apply to the Judge's fees in cases of final jurisdiction as he does not act as a committing magistrate in such cases.

The opinion of this office found in Quarterly Report of Attorney General, Volume II, page 301, supra, is hereby modified to conform to the above, and in any respects wherein said opinion is in conflict with this opinion, the same is overruled to that extent.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 30, 1940.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer Division,
Bessemer, Alabama.

Tax Assessor — (General Acts, 1935, p. 256, Sections 31, 59, 60, and 61).

Under the provisions of Section 31 of Revenue Act of 1935, it is the duty of a tax payer to render to the tax assessor a complete list of property of which he is the owner as of October 1st of that year.

If lands appear on the tax assessor's map book or plat book as acreage on October 1st of that year, it is the duty of the tax assessor to assess the same as acreage and not as lots and blocks.

Opinion by Assistant Attorney General McCall.

Dear Sir:

Your request for official opinion under date of December 13, 1940, is as follows:

"I respectfully request an official opinion as to when legal description of property should be changed for assessment to agree with maps of subdivisions filed in Probate Office. For example, a map was filed on October 21, 1940 in Probate Judge's office for record. The purchasers of the lots shown on this record are coming in to assess them as lots and blocks for tax year 1941. Should this property be assessed as acreage for tax year 1941, as the property subdivided was acreage on the first day of October?

"An early reply will be appreciated, as our time for making 1941 assessments is very short."

Your inquiry is answered in the affirmative. I call your attention to the pertinent parts of Sections 31, 59, 60, and 61 of Act No. 194, H. 324, approved July 10, 1935, (General Acts 1935, p. 256), which provide:

"Section 31. **It is the duty of every person in every election precinct to attend in person before the Assessor on the first day of the appointment in the precinct of the taxpayer's residence, and then and there render to the Assessor under oath a full and complete list of all property of which he was owner, or in which he had any interest whatever, or of which he was trustee or agent on the first day of October of that year** * * *" (Emphasis supplied).

"Section 59. It is the duty of the Tax Assessor of every county in the State to procure at the expense of the County a book in the form to be prescribed by the State Tax Commission, in which he shall enter a complete map and list of all the blocks and lots which have been platted, and the maps of which are recorded in the office of the Judge of Probate or can be procured within his County, beginning with the lowest numbered block and lot and proceeding in numerical order to the highest, with the name of the owner set opposite each block and lot, together with the assessed value thereof. Each subdivision or addition to any town or city shall be shown by proper headings at the top of each page of such lot book, and by index in the front thereof. The Tax Assessor shall annually make the entries thereon, for which he may be allowed a reasonable compensation by the Court of County Commissioners or Board of Revenue."

"Section 60. The Tax Assessor shall make, or cause to be made, a complete plat book or books of all real estate in the county, unless such book or books have already been provided, in a form to be prescribed by the State Tax Commission, in which the name of the owner shall be en-

tered on each separate subdivision, together with the assessed value thereof. The Court of county commissioners or court of like jurisdiction shall pay out of the general fund of the county, for making out the plat books required by this and the preceding section, a reasonable compensation to the person performing said work, which debt shall be preferred claim against the county."

"Section 61. The Tax Assessor shall each year before the first day of October in such year, revise the plat book provided for by Sections 59 and 60 of this Act, so as to correspond with the tax returns and values for such year, and as otherwise provided by law, or by the order of the State Tax Commission."

It will be noted that under the provisions of Section 31, supra, it is the duty of every person to render to the Tax Assessor under oath a full and complete list of all property of which he was the owner or in which he had any interest whatever on the first day of October of that year. Cf. **Quarterly Report of Attorney General, Volume XX,** pp. 265, 316. It will also be noted that under Section 61, supra, the Tax Assessor shall each year before the first day of October revise the plat book provided for by Sections 59 and 60 of Act No. 194, supra.

You state in your inquiry that the map was filed on October 21, 1940, in the office of the Judge of Probate for record. I do not believe that it was the intent of the Legislature to require the Tax Assessor to change his map and plat records except as provided under Sections 59, 60 and 61, supra, and it is therefore, my opinion that the property should be assessed as acreage for the tax year 1941.

Trusting this answers your inquiry, I am

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 31, 1940.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Elections — Qualified Electors — Board of Registrars — Judge of Probate — Registration — Poll Tax —

1. Persons, otherwise qualified as electors of the City of Montgomery, who have registered during the present session of the Board of Registrars of Montgomery County will not have their names placed on the official list of qualified electors to be used in the special Democratic Primary Election in the City of Montgomery to be held on January 14, 1941.

2. Persons, otherwise qualified as electors of the City of Montgomery, who have registered at the present session of the Board of Registrars of Montgomery County, and who have become 21 years of age since October 1, 1939, are entitled to vote in said election, even though their names do not appear on the official list of qualified electors to be used in said election, by complying with the requirements of law for challenged voters, but are not entitled to have absentee ballots issued to them, if they should be absent from the city on the day of said election.

3. Persons, otherwise qualified as electors of the City of Montgomery, who were delinquent in the payment of poll tax on February 1, 1940, are not entitled to vote in said election, even though they may have paid all poll taxes due by them since October 1, 1940.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion under date of December 23, 1940, is as follows:

"On the 14th day of January, next, there will be a primary election in the City of Montgomery to determine the nominee for the Democratic Party for Mayor of the City of Montgomery. The Board of Registrars, under the acts of the last Legislature, convened on the 25th day of November and will continue in session through the 31st day of January. You will note that the primary will be held on the 14th day of January.

"Section 401 of the Code of 1923, provides that the 'Board of Registrars shall each year within two weeks after the expiration of the time prescribed for registration make a list of the names registered . . . . along with the registration list must be returned to the Judge of Probate of the County. The Judge of Probate shall certify an alphabetical list to the Secretary of State,' etc

"Should the names of these persons who register be put upon the poll list before the adjournment of the Board of Registrars, and before the list is certified to the Judge of Probate, as provided for in Section 401 of the Code of 1923, if so, by what authority?

"I will thank you to give me an early opinion on this subject as practical for the reason that this election is near at hand and I desire to comply as strictly as I can to the mandates of the Statutes."

The statute under which sessions of the Board of Registrars of Montgomery County are held for the purpose of registering electors is Act No. 90, H. 252, approved February 12, 1937 (General Acts, 1936-37, page 107), which is a general act with local application and which has application at the present time only to Montgomery County. It provides in pertinent part in Section 1 thereof:

" * * * Beginning on the Fourth Monday in November, 1937, and each year thereafter the Board of Registrars shall be in session at the Court House daily for the purpose of registering voters, except hereinbefore stated to and including the last Friday in the succeeding January. * * *"

The fourth Monday in November, 1940, was November 25, 1940, and the last Friday in January, 1941, will be January 31, 1941. Consequently, the present session of the Board of Registrars of Montgomery County for the purpose of registering voters, which began on November 25, 1940, will not expire until January 31, 1941.

Section 401 of the Code of Alabama, 1923, provides:

"Section 401. List of names registered by precincts.—The Board of registrars shall each year within two weeks after the expiration of the time prescribed for registration, make a copy of the list of names registered, stating the residence, color and sex of the persons registered by precincts, if not in an incorporated city or town, or by ward if in an incorporated city or town, which copy, along with the registration list, must be returned to the office of the judge of probate of the county. The judge of probate shall certify an alphabetical list to the secretary of state. The judge of probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as recorded in the office of the judge of probate of the county, which shall be open to public inspection."

It is from this list which is furnished the Judge of Probate by the Board of Registrars under Section 401, supra, the poll tax list furnished him by the Tax Collector, and other information available to him, that the Judge of Probate makes the official list of qualified electors. See Section 387 of the Code of Alabama, 1923, as amended by Act No. 289, S. 179, approved August 20, 1927 (General Acts, 1927, page 274).

Until the Judge of Probate receives this list of persons registered from the Board of Registrars he has no way of officially knowing or ascertaining that a particular person whose name will appear on said list is in fact qualified as an elector, and, in the absence of the Judge of Probate officially knowing that a particular person has qualified as an elector, his name could not be placed on the list of qualified electors.

Section 401, supra, as I read it, contemplates that the Board of Registrars shall furnish the Judge of Probate one complete list, within two weeks after the expiration of the time prescribed for registration, of all persons registered during that period, and it does not contemplate that the Board of Registrars furnish the Judge of Probate partial lists of persons so registered by them before the expiration of the time prescribed for registration. Consequently, since the special Democratic Primary election in the City of Montgomery, referred to in your letter of inquiry, will be held on the 14th day of January, 1941, and the present session of the Board of Registrars of Montgomery County will not expire until January 31, 1941, the names of persons who have registered during this session of the Board of Registrars, even though they are otherwise qualified as electors of the City of Montgomery.

may not be placed on the list of qualified electors of the City of Montgomery which you are required to furnish the election officials in said special Democratic Primary election. This for the reason that at the time this list of qualified electors is furnished to the election officials for said special Democratic Primary election, you will not officially know that such persons are in fact qualified.

I have hereinabove made reference to the official list of qualified electors which you, as Judge of Probate, are required to furnish the election officials in said special Democratic Primary election. Ordinarily the official list of qualified electors in municipal elections is furnished by the municipal authorities rather than the Judge of Probate. See Section 1880, et seq., of the Code of Alabama, 1923. However, it seems too clear to admit of argument that you, as Judge of Probate of Montgomery County, must furnish this list in said special Democratic Primary election in the City of Montgomery because of the provisions of Act No. 533, H. 901, approved September 22, 1939 (General Acts, 1939, page 832) under which said election is to be held.

While I have held hereinabove that no person who has registered at the present session of the Board of Registrars of Montgomery County may have his name placed on the official list of qualified electors which you are required to furnish to the election officials in said special Democratic Primary election in the City of Montgomery, this does not mean that persons who have registered during this session of the Board of Registrars, and who are otherwise qualified as electors in the City of Montgomery, do not have the right to vote in said election. Per contra, it is my opinion that such persons, if they are otherwise qualified as electors in the City of Montgomery, do have the right to vote in said election and that they may do so by complying with the statutory requirements for challenged voters. See Subsection (z) of Section 18 of Act No. 533, supra; Section 18 of Act No. 56, H. 73, approved February 25, 1931 (General Acts, 1931, page 73); and Sections 497-501, Article XI, Chapter 19 of the Code of Alabama, 1923.

However, such a person, otherwise qualified as an elector of the City of Montgomery, is not entitled to have issued to him an absentee ballot to be cast in said election, if he should be absent from the city on the day of said election, though provision is made for absentee voting in said election under the provisions of Subsections (v) through (y) of Section 18 of Act No. 533, supra. This for the reason that Subsection (w) provides that an absent voter may procure a ballot from the Judge of Probate only "provided at the time he requests such ballot his name is on the official list of qualified electors of such city", and, as pointed out above, such a person's name will not be on the official list of qualified electors.

For the purpose of further clarifying the question of what persons whose names do not appear on the official list of qualified electors of the City of Montgomery to be used in said special Democratic Primary election will be entitled to vote in said election by complying with the requirements of law for challenged voters, I make the following general observations:

1. A person, otherwise qualified as an elector of the City of Montgomery, who has become twenty-one years of age since October 1, 1939, and

has duly registered, is entitled to vote in said election notwithstanding the fact that he may not have paid any poll tax. See **Section 194 of the Constitution** of Alabama, 1901; and **Finklea v. Farish,** 160 Ala. 230, 49 So. 366; opinion of the Attorney General to Hon. Elmer L. Vinson, Tax Collector, Limestone County, Athens, Alabama, under date of September 18, 1937, Quarterly Report of Attorney General, Vol. VIII, page 252.

2. A person, otherwise qualified as an elector of the City of Montgomery, who was delinquent in the payment of poll tax on February 1, 1940, is not entitled to vote in said election even though he may have paid all poll tax due by him since October 1, 1940. See Section 178 of the Constitution of Alabama of 1901; Section 361 of the Code of Alabama, 1923; **Graves v. Eubank,** 205 Ala. 174, 87 So. 587; opinions of the Attorney General to the Judge of Probate of Autauga County, Prattville, Alabama, under date of October 4, 1928, (Biennial Report of Attorney General, 1928-30, page 14); to the Tax Assessor, Jackson County, Scottsboro, Alabama, under date of September 19, 1930 (Biennial Report of Attorney General, 1928-30, page 933); to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 29, 1935 (Quarterly Report of Attorney General, Vol. I, page 249; and to Hon. Elmer L. Vinson, supra.

I realize that my opinion is not confined to an answer of your specific inquiry. However, I deemed it advisable to deal with the general subject involved for the purpose of answering collateral questions which necessarily arise as the result of my answer to your specific inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 31, 1940.

Hon. Howard Kirby, Clerk,
Circuit Court, Etowah County,
Gadsden, Alabama.

Costs and fees — Proration of cost —

Whenever cost is collected by either the sheriff or the clerk in any particular case and amount collected is not sufficient to pay all the costs, then the amount so collected must be prorated among those entitled to share in the same; except trial tax, which is not cost but an item of revenue.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 12, 1940, in which you request my official opinion as follows:

"Please render to me your official opinion on the following matter.

"Among executions returned by the Sheriff of this County "NO PROPERTY FOUND' out of which to make the cost or any part thereof it is my judgment that a large number of these could be collected although they assess no property except Homestead. Of course, I would not want to go to any expense to collect the Sheriff's part when he has failed to do so.

"The question is, Would not I be in the clear in such cases to collect all costs except the Sheriff's fees which he has failed to collect.

"What I have in mind to do is to employ a special collector provided that I am under legal obligation to collect the Sheriff's part when he has failed to collect.

"If I was allowed to collect as I have stated I am sure that the State would realize much as Trial Tax."

When cost is collected by either the clerk or the sheriff and the amount is not sufficient to pay all the costs of the case, the amount so collected must be prorated among those entitled to same, except the trial tax. This must be paid in full as it is no part of the cost of the case but an item of revenue. Quarterly Report of Attorney General, Volume XV, page 301; Quarterly Report of Attorney General, Volume XIV, page 311; **State v. Montevallo Coal Mining Company,** 197 So. 82, 197 So. 87.

Section 1 of Act No. 252, H. 172, approved September 24, 1923 (General Acts, 1923, page 259), is as follows:

"Section 1. That hereafter should any costs be collected either by the clerk or sheriff and there is not enough cost collected to pay the clerk and sheriff in full, the same amount must be prorated in proportion to the amount due each."

It might be argued that this rule should apply only where the costs are paid voluntarily to the sheriff or clerk or when collection is made by the sheriff after execution has been issued.

It is my opinion, however, that the above quoted provision applies even in those cases where execution has been returned "no property found" and costs are collected by the clerk solely through his own efforts. I think this conclusion is necessary in order to insure that the purpose for which the statute was enacted is effectuated. If the statute does not apply after execution has been returned "no property found," a sheriff who is unfriendly with a clerk might resort to the practice of returning executions "no property found," and then collecting his costs from the party responsible for the costs in accordance with an arrangement between them.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 31, 1940.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Voting Machines — Elections — Municipalities —

1. Where voting machines are adopted by the voters of an entire county such machines must be used in all elections held in the county, general, primary, special and municipal.

2. Governing bodies of the several municipalities located in a county which has adopted voting machines must provide such machines for municipal elections.

Opinion by the Attorney General.

Dear Sir:

Your request for official opinion, under date of December 12, 1940, is as follows:

"I request construction of Section 2, and Section 3, of what is known as the 'Voting Machine Statute' found on pages 444 and 445 of the 1939 Acts, with reference to the following questions:

"1. Where a county, pursuant to an election called by the Board of Revenue has, by a majority vote adopted the use of voting machines, DOES SUCH ELECTION BIND EVERY MUNICIPALITY IN THE COUNTY TO THE USE OF VOTING MACHINES?

"2. A county having adopted the use of voting machines, provided by Section 3, page 445 of the 1939 Acts, IS EACH MUNICIPALITY WITHIN SAID COUNTY AUTHORIZED TO EXPEND FROM ITS FUNDS, MONIES FOR THE PURCHASE OR RENTAL OF SAID VOTING MACHINES FOR USE IN THE MUNICIPALITIES FOR ELECTIONS, PRIMARY OR GENERAL, SOLELY MUNICIPAAL?

"Your attention is called to Section 3, in that the authorization for elections in the county is covered by sub-sections 'a' and 'c', while the provisions for elections in the City is (sic) covered, separately, by subsections 'b' and 'd'.

"You will note that the provisions throughout Section 3, as to County and City, are each in the disjunctive. The provisions apparently apply to the County **or** City."

The questions propounded by you present problems which are extremely difficult and I am frank to state that the conclusions which I have reached

in this opinion are not entirely free from doubt. The Act is not as specific as it might be in so far as the effect which elections held under the act have on the various political subdivisions of the county as a whole.

I am of the opinion that where the majority of the voters of an entire county have expressed their desire for voting machines to be used in elections in that county, that such machines are to be used in every election provided for by the election laws of the State of Alabama, including general, primary, special and municipal elections.

I base this conclusion in the main on the language of subsection (g) of Section 4 of Act No. 292, S. 332, approved August 25, 1939 (General Acts, 1939, pages 443, 447), which is as follows:

> "(g) When the use of voting machines is adopted and in and for any voting precinct within any county or municipality, then voting machines must be used in all general, primary, municipal, and special elections held thereafter in any such voting precinct."

There is no provision in the act whereby a voting precinct as such may determine that it does or does not desire to use voting machines, so it is my judgment that the use of the words "voting precinct within any county or municipality" in the above quoted provision indicates that the Legislature intended that when any voting precinct is once compelled to use voting machines regardless of the fact that such requirement was brought about in an election called by the governing body of only one political subdivision of the state that such machines must be used in all elections in which the voters of that precinct participate.

I think this conclusion is further substantiated by the following quoted provision of subsection (f) of Section 4 of Act No. 292, supra:

> "(f) Any county or city may, by a majority vote of all its qualified electors cast at any primary election held not earlier than six years after the adoption and installation of such machines, direct the discontinuance of the use of voting machines at election held in such county or city. The question of the discontinuance of the use of such voting machines shall be submitted to the voters, subject to the same requirements as to resolution or petition and signatures thereon as is required for the submission of the question on the authorization of the use of such voting machines. Where the qualified electors of any city and the qualified electors of the entire county containing therein such city, both have voted by separate questions in favor of the adoption of the use of voting machines, or where any county and any city within any such county, through its proper officiers, in pursuance of appropriate legislation, shall have separately authorized and directed the use of voting machines, a subsequent vote by the qualified electors of the entire county in favor of discontinuance will not be considered as a vote to discontinue the use of voting machines in such city. Such question as to the discontinuance of the use of voting machines shall be submitted in the following form: 'Shall the use of voting machines be continued in the (city or county) of_____ _____?'"

The provisions above quoted, in my opinion, indicate a legislative intention that the vote of the entire county shall control in all elections held within that county. However, the Legislature deemed it necessary to protect a municipality whose voters have expressed a desire for voting machines in an election called by the governing body of the municipality from being deprived of the use of such machines by the voters of the county as a whole changing their position in regard to voting machines.

In answer to your second inquiry, it is my opinion that where a majority of the voters of a county have determined that they desire the use of voting machines in that county, that it is incumbent upon the governing body of the municipalities located in that county to make arrangements for the use of voting machines for municipal elections. It is my opinion that a municipality is authorized to expend its funds either for the rental or the purchase of voting machines to be used in municipal elections. I might add that I know of no provision of law which would prevent the municipality from renting the voting machines from the county in which such municipality is located.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 31, 1940.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

United States — States — Alabama Alcoholic Beverage Control Board — Taxation — Miltary Reservations —

1. A voluntary unincorporated organization of Army or Navy personnel, such as a post exchange, held instrumentality of the United States.

2. Alabama Alcoholic Beverage Control Board held without authority and jurisdiction, under the so-called Buck Resolution, to levy and collect tax on malt beverages sold on military reservations located in the State of Alabama ceded to the United States, through voluntary unincorporated organizations of Army or Navy personnel, such as post exchanges, to authorized purchasers, under regulations promulgated by the Secretary of War or the Secretary of the Navy.

Opinion by Assistant Attorneys General Garrett and Hare.

Dear Sir:

Your request for an official opinion under date of December 11, 1940, is as follows:

"Under date of August 18, 1938, the Attorney General's office rendered an opinion to the effect that the Alabama Beverage Control Act did not take effect upon Military Reservations ceded to the U. S. Government.

"Under date of September 29, 1938, the Alabama Alcoholic Beverage Control Board promulgated Rules and Regulations governing the sale of wine and liquor, also malt or brewed beverages to Military Reservations. Copies of such Rules and Regulations are attached hereto.

"We are also attaching a copy of the Buck Resolution which was adopted by the U. S. Congress on October 9, 1940, which deals with sales to Military Reservations located upon Federal areas located within various States.

"We would like to have your opinion as soon as possible as to whether or not the Alabama Alcoholic Beverage Control Board has the authority, under this Buck Resolution, to collect a tax on all shipments made to Federal Reservations located within the State of Alabama.

"We would also like to know, in the event you hold we have the authority to collect this tax, whether or not officers stationed on Military Reservations ceded to the U. S. Government would be bound to the State Law prohibiting the importation of any alcoholic beverages except through the Alabama A. B. C. Board."

The opinion of this office to which you refer in your letter of inquiry was rendered to Hon. D. E. Dunn, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of August 18, 1938, (Quarterly Report of Attorney General, Volume XII, page 112) and held:

"1. The Alabama Beverage Control Act is not effective upon military reservations within the confines of the State of Alabama ceded to the United States.

"2. The Alabama Alcoholic Beverage Control Board may promulgate rules and regulations as may be mutually satisfactory to itself and the military authorities, for importation and disposition of alcoholic beverages for consumption upon military reservations within the state, which have been ceded to the United States."

The only possible effect which the so-called Buck Resolution, an enactment of the Congress of the United States, Public Number 819, 76th Congress, Chapter 787, 3rd Session, H. R. 6687, approved October 9, 1940, could have upon the holding of that opinion would be to modify the same to the extent that the Alabama Alcoholic Beverage Control Board might have authority and jurisdiction to levy and collect the tax on malt beverages levied by Section 27 of the Alabama Beverage Control Act, Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937 (General Acts, 1936-37, page 40), as to such beverages sold on military reservations within the confines of the State of Alabama ceded to the United States.

The so-called Buck Resolution only purports to permit the various states, territories and possessions of the United States to extend their sales, use, and income taxes to persons residing or carrying on business, or to transactions occurring, in Federal areas within such states, territories, or possessions. Consequently, by no process of reasoning could it be concluded that this enactment gave to the Alabama Alcoholic Beverage Control Board any authority or jurisdiction upon military reservations within the confines of Alabama ceded to the United States, other than the authority and jurisdiction to levy and collect the tax on malt beverages hereinabove referred to, as to such beverages sold on such reservations.

If malt beverages are sold on such reservations by private individuals, concessionaires, or in any other manner, than through "commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel," to authorized purchasers, "under regulations promulgated by the Secretary of War or the Secretary of the Navy," then it seems too clear to admit of argument that under the authority of the so-called Buck Resolution the Alabama Alcoholic Beverage Control Board would have the authority and jurisdiction to levy and collect the tax hereinabove referred to on such malt beverages.

On the other hand, there is considerable controversy as to whether or not the so-called Buck Resolution is efficacious to invest the Alabama Alcoholic Beverage Control Board with the authority and jurisdiction to levy and collect said tax on malt beverages sold on such reservations through "commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel" to authorized purchasers "under regulations promulgated by the Secretary of War or the Secretary of the Navy." The provision of the so-called Buck Resolution which gives rise to this controversy is Section 3 thereof which reads as follows:

> "Sec. 3(a) The provisions of Sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.
>
> "(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, shop's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy."

The provisions of Section 1 referred to in the above quoted excerpt are the provisions which purport to permit the States, territories and possessions of the United States to extend their sales and use taxes to persons residing or carrying on business, or to transactions occurring, in Federal areas within the various States, territories, and possessions of the United States.

Since it is my information that there are no malt beverages sold on such reservations in the State of Alabama through commissaries or ship's stores,

I shall confine myself to a consideration of whether or not the Alabama Alcoholic Beverage Control Board, under the authority of the so-called Buck Resolution, has the authority and jurisdiction to levy and collect this tax on malt beverages sold on military reservations through "voluntary unincorporated organizations of Army or Navy personnel" to authorized purchasers "under regulations promulgated by the Secretary of War or the Secretary of the Navy."

If such voluntary unincorporated organizations are instrumentalities of the United States, then the Alabama Alcoholic Beverage Control Board would not have the authority and jurisdiction to levy and collect said tax on malt beverages sold by them in the manner hereinabove described. Per contra, if such voluntary unincorporated organizations are not instrumentalities of the United States, the Alabama Alcoholic Beverage Control Board would have the authority and jurisdiction to levy and collect said tax on malt beverages sold by them in the manner hereinabove described.

So far as I am aware, the question of whether or not such voluntary unincorporated organizations, commonly referred to as "post exchanges", are instrumentalities of the United States, has never been directly decided by the United States Supreme Court. There is a conflict of authorities on this question.

The leading cases in support of the view that such voluntary unincorporated organizations are not instrumentalities of the United States are:

Standard Oil Company v. California, 22 P. (2d) 2;

Pan-American Petroleum Corporation v. State of Alabama, 67 Fed. (2d) 590, cert. den. by the Supreme Court of the U. S. without opinion in 291 U. S. 670, 78 Law. Ed. 1060;

Keane v. United States, 272 Fed. 577.

The California case merely held that the Army post exchange at Presidio Military Reservation was not a "department of the United States Government" within the meaning of a state statute exempting the United States Government or any department thereof from a license tax on gasoline sold for official use. However, the decision of the Supreme Court of California in said case was reversed by the United States Supreme Court in **Standard Oil Company v. California,** 291 U. S. 242, on the ground that the State had ceded its legislative authority over this military reservation to the United States, and the Supreme Court did not pass on the question of whether or not such a voluntary unincorporated organization was or was not an instrumentality of the United States.

In the Pan-American Petroleum Corporation case, an Alabama statute levying a tax on the withdrawal of gasoline from storage was under consideration, and the question before the Court for decision was whether or not such tax was leviable and collectible on gasoline withdrawn from storage in the State of Alabama for the purpose of being sold to such a voluntary unin-

corporated organization located on a military reservation within the State of Alabama which had been ceded to the United States. While the Court in its opinion in that case did make the positive statement that such a voluntary unincorporated organization was neither the Government (United States), or a department or instrumentality thereof, its decision seems to have been rested upon another ground, and, as pointed out hereinabove, the Supreme Court of the United States in denying certiorari in the case wrote no opinion.

In the Keane case, which was a criminal proceeding, the question before the Court was whether or not proof of a conspiracy to defraud such a voluntary unincorporated organization would sustain an indictment for conspiracy to defraud the United States, and a divided Court held that such proof would not sustain the indictment, as such a voluntary unincorporated organization was not "a department of the Government".

The leading cases in support of the view that such voluntary unincorporated organizations are instrumentalities of the United States are:

Dugan v. The United States, 34 Ct. of Cls. 458;

Woog v. The United States, 48 Ct. of Cls. 80;

United States v. Query, 21 Fed. Supp. 784;

New York ex rel. Rogers v. Graves, 299 U. S. 401.

In the Dugan case, in speaking to the question of whether or not such a voluntary unincorporated organization was a governmental agency, the Court said:

> "If, therefore, in the judgment and wisdom of the Executive, the establishment of such post exchanges and their management by the officers of the Army are essential to the welfare, good order, and discipline of the troops stationed at such Army posts, as seems evident from the exchange regulations thus promulgated, then we think such exchanges, though conducted without financial liability to the Government, are, in their creation and management, governmental agencies, established for the purpose, as the regulations provide, of supplying 'the troops as reasonable prices with the articles of ordinary use, wear, and consumption not supplied by the Government, and to accord them means of rational reaction (sic) and amusement,' and also 'through exchange profits, to provide the means for improving the messes.'
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> * * * * * * *
>
> "The Government, through its officers, by authority of the regulations, not only establishes and maintains such exchanges, but receives, handles, and disburses the funds in connection therewith, and whatever profit accrues is paid over to and held by the officer in command of such organizations as a company fund."

In the Woog case, the Court of Claims, in holding that such a voluntary unincorporated organization was an instrumentality of the Government, said:

> " * * * As shown in Dugan's case, supra, the Government acts through its officers under authority of the regulations, and the officer put in charge receives and disburses all the funds, and whatever profit that may accrue is paid to and held by the officer in command of such organization as a company fund. Regulations of the Navy Department, sections 1035 and 1040, inclusive, provide for the establishment of post exchanges. These regulations conflict with no law."

In the Query case, the Court had under consideration the question of whether or not a Civilian Conservation Corps Camp exchange established under Sections 584-584p, Title 16, U.S.C.A., and analogous in many respects to such a voluntary unincorporated organization as a post exchange, was a Government instrumentality. I quote from the opinion of the Court in that case as follows:

> "The camp exchange is an integral and necessary part of the Corps which is engaged in providing employment as well as vocational training to unemployed citizen of the United States for the performance of useful work and in salvaging and conserving the natural resources of the United States. Such a function of the Government is authorized under Article 1, Sec. 8, cl. 1, of the Federal Constitution. A high state of morale and contentment is necessary to a full consummation of the objectives of the Corps, to create and maintain which the institution of the camp exchange was established as an essential element of the program for unemployment relief. It is operated in a building erected and maintained by Federal funds on lands privately owned, but leased for a specified term by the United States. It was not created for private gain, but wholly for governmental purposes. It is not conducted primarily for profit, but is operated essentially for the welfare of the camp's enrollees in furtherance of the objectives of the Corps. Sales to outsiders are strictly prohibited by the statute creating the camp exchange. It follows that the Civilian Conservation Corps camp exchange is a Federal instrumentality. **New York ex rel. Rogers v. Graves,** 299 U. S. 401, 57 S. Ct. 269, 81 L. Ed. 306; **Johnson v. Maryland,** 254 U. S. 51, 41 S. Ct. 16, 65 L. Ed. 126; **Graves v. Texas Co.,** 298 U. S. 393, 56 S. Ct. 818, 80 L. Ed. 1236; **Panhandle Oil Co. v. Knox,** 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A.L.R. 583; **Ohio v. Thomas,** 173 U. S. 276, 19 S. Ct. 453, 43 L. Ed. 699; **United States v. Rickert,** 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532; **Clallam County v. United States,** 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328 **Shaw v. Oil Corporation,** 276 U. S. 575, 48 S. Ct. 333, 72 L. Ed. 709; **United States v. Wright,** 4 Cir., 53 F. 2nd 300."

In the Rogers case, the question before the Supreme Court of the United States was whether or not the salary of the General Counsel of the Panama Rail Road Company, an instrumentality of the United States, was subject to the income tax levied by the State of New York. That company operates a railroad across the Isthmus of Panama, conducts a commissary establishment for the benefit of the personnel of the Panama Canal, the company, and

the armed forces of the United States upon the Isthmus, and operates a dairy and two hotels in connection therewith. It was contended by counsel for the State of New York that the dairy, hotels, etc., built and maintained by the company were not Governmental instrumentalities. In considering this contention the Supreme Court, in an opinion by Mr. Justice Sutherland, observed:

> "It is suggested that the dairy, hotels, and other enterprises, built and maintained by the company, are not governmental instrumentalities. Even if we accept that conclusion—**which, in view of their use for the personnel of the railroad and canal, we are far from doing**—it would not alter the fact that the railroad itself, in connection with the canal, is a Federal instrumentality." (Emphasis supplied).

The Court held in that case that the salary of the General Counsel of the Panama Rail Road Company was not subject to the income tax levied by the State of New York for the reason that he was an official or employee of an instrumentality of the United States. It is true that the holding of this case was expressly overruled in the more recent case of **Graves v. New York ex rel. O'Keefe,** 306 U. S. 466, but I think, nevertheless, that the above quoted excerpt is significant in regard to the view which the Supreme Court of the United States might take of the instant question, if and when it is called upon to decide the same.

The President of the United States by Executive Order No. 6589, dated February 6, 1934, has recognized such voluntary unincorporated organizations as instrumentalities of the United States; and the Attorney General of the United States has held them to be instrumentalities of the United States, in an opinion under date of August 5, 1939, by Hon. Robert H. Jackson, the then Acting Attorney General. This view has long been held by the Judge Advocate General's Department of the Army and many other departments and agencies of the United States Government.

Too, it seems to me that the Congress of the United States, in the so-called Buck Resolution, has inferentially recognized such voluntary unincorporated organizations as instrumentalities of the United States, then that part of subsection (b) of Section 3, supra, dealing with purchases by authorized purchasers from "voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy" would be meaningless.

The premises considered, I am constrained to hold that such a voluntary unincorporated organization of Army or Navy personnel, commonly known as a post exchange, is an instrumentality of the United States. Consequently, it is my opinion that the Alabama Alcoholic Beverage Control Board does not have the authority and jurisdiction, under the so-called Buck Resolution, to levy and collect the tax hereinabove referred to on malt beverages sold through such voluntary unincorporated organizations located on military reservations within the State of Alabama ceded to the United States, to authorized purchasers under regulations promulgated by the Secretary of War or the Secretary of the Navy.

The opinion to Hon. Haygood Paterson, Commissioner, Department of Agriculture and Industries, Montgomery, Alabama, under date of March 27, 1940, (Quarterly Report of Attorney General, Volume XVIII, page 371) insofar as it hold that a voluntary unincorporated organization of Army or Navy personnel, such as a post exchange, is not an instrumentality of the United States, is expressly overruled, and said opinion is hereby modified to conform to the conclusions herein reached.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 31, 1940.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
State Department of Finance,
The Capitol.

Jefferson County — Commissioner of Licenses — Driver's License Fees —

1. The 10c fee provided in the 1939 Driver's License Act (General Acts, 1939, page 300) for taking applications, etc., for driver's licenses, belongs to the Commissioner of Licenses of Jefferson County personally.

Opinion by the Attorney General.

Dear Sir:

Your request for official opinion, bearing date of October 9, 1940, is as follows:

"Please refer to Act 181, House Bill 245, Page 300, General Acts of 1939 and advise me in answer to the following question.

"Does the ten cent fee provided for in the 1939 Driver's License Act for taking applications for drivers' license belong to the Commissioner of Licenses of Jefferson County personally, or should such fee be converted by him into the County Treasury?

"I have recently assigned Examiners of Accounts to make an audit of this particular office and inasmuch as the information herein requested will be needed in connection with this examination, I would thank you very much for your early attention to this request."

Section 2 of Act No. 181, H. 245, approved March 18, 1939, (General Acts, 1939, page 300) provides that at the time of the filing of the application for a driver's license, the applicant shall pay to the Probate Judge a fee of $1.10.

Section 3 of said act provides for the forwarding of such application to the Director of Public Safety, etc., by the Probate Judge, and specifically provides:

> "He shall also at said time deliver to the State Treasurer the amount of all such fees collected, less ten (10c) cents for each application received or permit issued **which sum shall be retained by him and shall be his sole compensation for performing any and all duties required of him under the provisions of this act.**" (Emphasis supplied).

In Jefferson County, the Commissioner of Licenses stands in the place of the Probate Judge in regard to the issuance of drivers' licenses. That this is so appears from the following excerpt from the opinion of the Supreme Court in **McDowell v. Henry,** 238 Ala. 663, 193 So. 108:

> "By special statute creating the office of commissioner of licenses in Jefferson County, he stands in place of the judge of probate under the general law applicable to other counties in the collection of license taxes, issuance of licenses, and other legal duties pertaining thereto. General Acts 1931, p. 522; State ex rel. Ward v. Henry, 224 Ala. 224, 139 So. 278, State on Behalf of Henry v. State ex rel. Tutwiler Co., supra (230 Ala. 657, 162 So. 366)."

Therefore, the Commissioner of Licenses of Jefferson County is entitled personally to the fee provided in the above quoted excerpt from Section 3, supra, unless there are other applicable statutory provisions providing for a different disposition of the same. My research discloses that if there is any such statute, it is Act No. 27, S. 123, approved March 8, 1933, (Local Acts, 1933, page 14), Section 1 of which reads as follows:

> "Section 1. That all fees which may be collected for the performance of any official service by any officer of Jefferson County, Alabama, who is compensated for his service by a salary shall, as soon as collected, be paid into the County treasury to the credit of the general fund of said county, except such fees as may now, by law, be required to be paid into the State Treasury."

This Act applied to the Commissioner of Licenses of Jefferson County, since, at the time of its passage, he was a county officer of said county compensated for his services by a salary. Act No. 431, H. 880, approved July 16, 1931, (General Acts, 1931, page 522) as Sections 11 and 15 thereof were amended by Act No. 196, H. 592, approved November 3, 1932 (General Acts, 1932, page 206).

The Legislature of Alabama, in dealing with the general subject of the compensation of the county officers of Jefferson County, acts pursuant to

authority invested in it by Amendment No. II to the Constitution of Alabama of 1901, which reads as follows:

> "II. AS TO FEES OF OFFICERS OF JEFFERSON COUNTY. The Legislature of Alabama may hereafter, from time to time, by general or local laws, fix, regulate and alter the costs, charges of courts, fees, commissions, allowances or salaries to be charged or received by any county officer of Jefferson County, including the method and basis of their compensation."

In the cast of **State ex. rel. Ward v. Henry,** 224 Ala. 224, 139 So. 278, the Supreme Court specifically held that, under the authority of this Amendment, the Legislature could provide for the compensation of the county officers of Jefferson County either by salary, or by a combination of salaries, fees and commissions, or merely by fees and commissions. Therefore, it is necessary to decide only the question of whether or not the Legislature, by the enactment of the above quoted provisions of Section 3 of Act No. 181, supra, intended to provide additional compensation for the Commissioner of Licenses of Jefferson County for the performance of the duties placed upon him by said Act.

It is my opinion that the Commissioner of Licenses for Jefferson County is entitled personally to said fee, in addition to his salary, it being my judgment that the provisions of Section 3 of Act No. 181, supra, are, in effect, a pro tanto amendment of Section 1 of Act No. 27, supra, and are therefore controlling.

I am persuaded to this conclusion by the logic employed by the Supreme Court in the case of **Waldrop v. Henry,** 207 Ala. 128, 92 So. 425. In that case the Court held that the Clerk of the Circuit Court of Jefferson County was personally entitled to the fee provided by Section 9 of the so-called "Dog License Act" of 1919, Act No. 728, H. 281, approved September 30, 1919, (General Acts, 1919, page 1077), for the services rendered by him in connection with such act, despite the provisions of Section 2 of Act No. 468, H. 913, approved September 14, 1915, (Local Acts, 1915, page 374). Act No. 468, supra, fixed the salaries of sundry officers of Jefferson County, including the Clerk of the Circuit Court, and Section 2 thereof provided:

> "That when this Act goes into effect the costs, charges of Court, fees and commissions now authorized by law to be collected and retained by the several officers of Jefferson County above named, shall continue to be collected, but shall be paid into the County treasury by the officer collecting the same, as other moneys belonging to the County are paid."

(It is to be noted that this Section is very similar to Section 1 of Act No. 27, supra, except that the latter applies to all officers of Jefferson County who are compensated by a salary rather than to specifically named ones).

In the so-called "Dog License Act" of 1919, supra, it was made the duty of the Circuit Clerk to collect the amount of the tax due and to issue the receipt therefor, and Section 9 thereof provided as follows:

"That all things required to be furnished by the Circuit Clerk for carrying out the provisions of this Act shall be paid for out of the general funds of the State and for the services required by this Act to be rendered the Circuit Clerk is hereby authorized to collect a fee of twenty-five (25c) cents for each receipt issued with the tax."

Though this provision did not specifically say that the Circuit Clerk should retain the fee, but merely authorized him to collect the same, yet the Supreme Court of Alabama held that the Circuit Clerk of Jefferson County was entitled to said fee personally, notwithstanding the provisions of Section 2 of Act No. 468, supra, stating that it neither had "nor has any reference to fees, etc., later, in 1919, authorized to be collected for new and different services to be rendered by the Circuit Clerk in the administration of the subsequently enacted law. There was therefore no conflict or other inconsistency between the provisions of the local act of 1915 and the additional compensation, through 'receipt fees', authorized by Section 9 of the 'Dog Law' to be collected by the Circuit Clerk for the new and different services thereby imposed upon the Circuit Clerks." This decision was cited approvingly and followed in **Sloss-Sheffield Steel and Iron Company v. Brooks,** 19 Ala. App. 107, 96 So. 81; Certiorari denied 209 Ala. 264, 96 So. 83.

This question was again before the Supreme Court in the case of **Jefferson County v. Waldrop,** 207 Ala. 606, 93 So. 540, in which case the Supreme Court affirmed a judgment against the county in favor of the Circuit Clerk for the fees collected under Section 9 of the so-called "Dog License Act" of 1919, supra, upon the authority of **Waldrop v. Henry, supra.** In this later case, Mr. Justice Gardner, now Chief Justice, dissented, and it has been asserted that the reason for his dissent was that the previous opinion had been primarily predicated upon the use of the word "now" in Section 2 of Act No. 468, supra. As I read the dissenting opinion, the real basis for Mr. Justice Gardner's dissent was that the Circuit Clerk was not entitled to said fee, whether the word "now" in said Section was the controlling word leading to the conclusion of the Supreme Court in the original case or not.

Additional authority for this conclusion is found in the cast of **Dillon v. Hamilton,** 230 Ala. 310, 160 So. 708, wherein Mr. Justice Foster, speaking for the Supreme Court, **with Mr. Justice Gardner concurring,** stated:

"Appellant contends that the act of 1915 does not apply to the commission for assessing the Bessemer taxes enacted in 1923 (Waldrop v. Henry, 207 Ala. 128, 92 So. 425); * * * * Appellant relies upon the settled principle that, when additional duties were imposed after the salary was fixed by the Local Act of 1915, he was authorized to receive additional compensation provided for such additional duties. Waldrop v. Henry, 207 Ala. 128, 92 So. 425; Jackson v. Sherrod, 207, Ala. 245, 92 So. 481; Jefferson County v. Waldrop, 207 Ala. 606, 93 So. 540; Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052.

"That theory is well supported. * * *"

The opinion of this office to Hon. Roy Johnson, Tax Assessor, Jefferson County, Birmingham, Alabama, under date of November 4, 1938 (Quarterly Report, Attorney General, Volume XIII, page 61), is also authority for this conclusion. This opinion held that the Tax Assessor of Jefferson County was entitled personally to the $1,000.00 provided by Section 22 of the General Revenue Act of 1935 as compensation for assessing county and district school taxes, in addition to his salary of $4,800.00 fixed by Act No. 166, H. 29, approved April 19, 1933, (Local Acts, 1933, page 43), notwithstanding the provisions of Act No. 27, supra. Cf. opinion of this office to Hon. T. C. Garner, Treasurer, Jefferson County, Birmingham, Alabama, under date of November 23, 1938, a copy of which is enclosed for your information, wherein this office reached a like conclusion on a similar question in regard to the Tax Collector of Jefferson County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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